(5) (4)

Supreme Court, U.S.
FILED
AUG 2 1989
JOSEPH F. SPANIOL, JR.
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No. 88-1595, 88-1771

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners, Cross-Respondents,

v.

JOSEPH A. BONJORNO, LORRAINE KERR (EXECUTRIX OF THE WILL OF GEORGE M. KERR, JR.) and BARBARA K. CLISBY,
Respondents, Cross-Petitioners.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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CROSS-PETITION FOR CERTIORARI FILED APRIL 28, 1989
CERTIORARI GRANTED JUNE 19, 1989

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CIVIL DOCKET
UNITED STATES DISTRICT COURT
C.A. 74-122

	Date	*Proceedings*
	1974	
1	Jan 17	Complaint filed.
	Jan 17	Summons exit.
	Jan 17	JURY TRIAL DEMANDED.
2	Jan 17	Plff's requests for production of documents – First Set, filed.
3	Jan 17	Plff's motion for substituted service pursuant to FRCP 4(d)(7), filed.
[3]	Jan 18	ORDER that service of summons, complaint, and other process may be made on defts (Kaiser Ind., Kennedy Culvert, and R.A. Kennedy) by service on the Secty. of the Dept. of State of Comm. Pa., filed. AL 1-21-74 Entered & copies mailed.
4	Feb 11	Appearance of Stradley, Ronon, Stevens & Young as counsel for defts R.A. Kennedy and Kennedy Culvert & Supply Company, filed.
5	Feb 12	Stipulation that defts R.A. Kennedy and Kennedy Culvert & Supply Company's time within which to file their answer is extended to 2-20-74, with Clerk's approval, filed. CLERK
6	Feb 13	Summons returned "on 1-23-74 served Secty. of Commonwealth, Robert A. Kennedy, and Kennedy Culvert & Supply Company, all by Registered Mail; on 1-24-74 served Kaiser Industries Corporation, by Registered Mail; on 1-31-74 served Kaiser Aliminum & Chemical Corporation," filed.
7	Feb 20	Motion of Kennedy Culvert & Supply Company to dismiss complaint, presenting defenses of lack of service of process, jurisdiction, impropc : venue and failure to state a

Date		Proceedings
1974		
		claim; notice of motion; filed.
8	Feb 20	Motion of Robert A. Kennedy to dismiss complaint, presenting defenses of lack of service of process, jurisdiction, improper venue and failure to state a claim; notice of motion; filed.
9	Feb 20	Motion of deft Kaiser Industries Corporation to dismiss for lack of *in personam* jurisdiction, improper venue, and insufficiency of service of process; notice of motion; memorandum in support of motion to dismiss, filed.
10	Feb 20	Answer of deft Kaiser Aluminum & Chemical Corporation, filed. (1 of 4)
11	Feb 20	Deft Kaiser Aluminum & Chemical Corporation's First Set of interrogatories to plff, filed.
12	Feb 20	Deft Kaiser Aluminum & Chemical Corporation's First Request for the production of documents, filed.
13	Feb 21	Praecipe to issue alias summons as to Kennedy Culvert and Supply Company, filed.
	Feb 21	Alias summons, as to Kennedy Culvert & Supply Company, exit.
14	Mar 1	ORDER [dated 2-28-74] that this action be reassigned from the calendar of Judge Luongo to the calendar of Judge Green, filed. VA 3-4-74 Entered & copies mailed.
15	Mar 11	Plff's response to motions of defts Robert A. Kennedy and Kennedy Culvert & Supply Company to dismiss, filed.
16	Mar 11	Plff's first set of interrogatories to defts, Robert A. Kennedy and Kennedy Culvert & Supply Company, filed.

Date		Proceedings
1974		
17	Mar 11	Plff's request to defts Robert A. Kennedy and Kennedy Culvert & Supply Company for production of documents, filed.
	Mar 13	Memorandum of Robert A. Kennedy and Kennedy Culvert & Supply Company in support of motions to dismiss under FRCP Rule 12; notice pursuant to FRCP Rule 36; affidavits of Robert A. Kennedy, in his individual capacity and as President of Kennedy Culvert & Supply Company, filed.
	Mar 20	ORDER that plff file a memorandum responding to defts' motions to dismiss for lack of jurisdiction and improper venue within 15 days after receipt of the information requested in plff's interrogatories and request for production of documents relating to these issues; decision on said defts' motions to dismiss Count V for failure to state a claim is POSTPONED pending resolution of the motions relating to personal jurisdiction and venue, filed. CG 3-21-74 Entered & copies mailed.
	Mar 21	Alias summons returned "on 3-13-74 served Secty. of Commonwealth and deft Kennedy Culvert & Supply Company, both by Registered Mail," filed.
	Apr 1	Plff's response to deft Kaiser Aluminum & Chemical Corporation's first request for production of documents, filed.
	Apr 1	Objections of plff to deft Kaiser Aluminum & Chemical Corporation's first set of interrogatories, filed.
	Apr 9	Memorandum in support of motion by deft Kaiser Industries Corporation to dismiss the complaint on the grounds of improper

Date	Proceedings
1974	
	venue, insufficiency of service of process and lack of personal jurisdiction; affidavit of James K. Parker in support thereof, filed.
Apr 17	Plff's answers to deft Kaiser Aliminum & Chemical Corporation's first set of interrogatories, filed.
Apr 18	Plff's first set of interrogatories to deft Kaiser Industries Company, filed.
Apr 23	ORDER that this action is reassigned from the calendar of Judge Green to the calendar of Judge McGlynn for all further proceedings, filed. VA/Clk 4-24-74 Entered & copies mailed.
Apr 26	Plff's notice of motion to compel defts Robert A. Kennedy and Kennedy Culvert & Supply Company to produce documents and to strike said defts' motion to dismiss, filed.
May 6	Deft Kennedy Culvert & Supply Company's notice of abandonment of motion to dismiss for improper service of process and for improper venue, filed. [Paper #7]
May 6	Answer of deft Kennedy Culvert & Supply Company, filed (2 of 4)
May 6	CASE LISTED FOR TRIAL.
May 13	Order that pursuant to the Notice of Abandonment of Motion filed on 5-6-74, the motion to dismiss for improper service of process and for improper venue, filed on behalf of Kennedy Culvert & Supply Co., on 2-20-74, is WITHDRAWN, filed. JM/Clerk 5-14-74 entered and copies mailed.
May 14	Plff's Pre-Trial Memorandum pursuant to Local Rule 7, filed.

Date		Proceedings
1974		
	May 20	Objections of deft Kaiser Industries Corporation to plff's first set of interrogatories, filed.
33	May 21	Answers of deft Robert A. Kennedy to plff's first set of interrogatories, filed.
34	May 23	Plff's memorandum opposing motion to dismiss of deft Robert A. Kennedy, filed.
35	Jun 10	Answers of deft Kaiser Industries Corporation to plff's first set of interrogatories, filed.
36	Jun 14	Affidavit of Robert A. Kennedy in further support of his motion to dismiss, filed.
37	Jun 21	Plff's motion to compel answers by deft Kaiser Industries Corporation to interrogatories, notice of motion, and memorandum in support thereof, filed.
38	Jun 21	Plff's response to motion of deft Kaiser Aluminum & Chemical Corporation to compel further answers to first set of interrogatories to plff, filed.
39	Jun 21	Motion of deft Kaiser Aluminum & Chemical Coporation pursuant to FCRP Rule 37 to compel further answers to "first set of interrogatories to plff" and for sanctions, notice of motion, memorandum in support thereof, filed.
40	Jun 21	Stipulation and ORDER re: production of documents and confidentiality, etc., filed.
41	Jun 21	Plff's notice of deposition of Philip Buchy on 7-15-74, filed.
42	Jun 24	Memorandum of deft Kaiser Industries Corporation in opposition to plffs' motion to compel answers to interrogatories, filed.
43	Jun 24	Plffs' praecipe for the issuance of an alias summons as to deft George A. Wenzel, filed.
	Jun 24	Alias summons exit.

Date		Proceedings
1974		
4-	Jun 25	Argued sur motion of deft Robert A. Kenndey to dismiss. . . . . .C.A.V.
44	Jun 28	Plff's motion to compel deft Kaiser Aluminum & Chemical Corporation to produce documents, notice of motion, memorandum in support thereof, filed.
45	Jun 28	Memorandum of deft Kaiser Aluminum & Chemical Corporation in opposition to plff's motion to compel production of documents, filed.
46	Jul 9	Plff's notice of deposition of Robert A. Kennedy, as President of dft Kennedy Culvert & Supply Company on 7-15-74, filed.
47	Jul 11	Plff's answer to deft Kaiser Aluminum & Chemical Corporation's motion to compel further answers to first set of interrogatories, filed.
48	Jul 11	Plff's supplemental answers to deft Kaiser Aluminum & Chemical Corporation's first set of interrogatories, filed.
		No Paper 49 Assigned
50	Jul 21	Reply memorandum of deft Kaiser Aluminum & Chemical Corporation in support of motion to compel further answers to interrogatories, filed.
51	Sep 10	Memorandum and ORDER, McGlynn, J. wherein it is ordered that the motion of deft Robert A. Kennedy to dismiss the complaint is GRANTED, filed. JM 9-11-74 Entered & copies mailed.
	Sept 18	Plff's first set of interrogatories addressed to deft Kaiser Aluminum & Chemical Corporation, filed.
	Sept 24	Plff's motion for reconsideration of Order granting deft Kennedy's motion to dismiss,

Date	Proceedings
1974	
	notice of motion, with memorandum in support thereof, filed.
Oct 2	Memorandum of deft Robert A. Kennedy in opposition to plff's motion for reconsideration, filed.
Oct 7	ORDER that plff's motion for reconsideration is DENIED, filed. JM 10-8-74 Entered & copies mailed.
Oct 9	Plff's notice of appeal, filed. (74-2170)
Oct 9	Copy of clerk's notice of appeal to U.S.C.A., filed.
Oct 21	Bond for Costs on Appeal in the sum of $250.00 with Fidelity and Deposit Company of Maryland as surety, filed.
Oct 21	Appellant's statement pursuant to Rule 10 of Federal Rules of Appellate Procedure, filed.
Oct 25	Deft Kaiser Aluminum & Chemical Corporation's objections to plff's first set of interrogatories addressed to said deft, filed.
Oct 30	Original record transmitted to U.S. Court of Appeals. [Except 43,49]
Nov 7	Deft Kaiser Aluminum & Chemical Corporation's response to plff's requests for production of documents – first set, filed.
Nov 25	Answers of deft Kaiser Aluminum & Chemical Corporation to plff's first interrogatories – first set, filed.
Dec 11	Plff's motion for certification under Rule 54(b), Notice of Motion, Memorandum in support, filed.
Dec 12	Deft., Robert A. Kennedy's answer to plff's motion for certification under Rule 54(b), memorandum contra plff's motion, filed.
Dec 16	Plff's motion for order compelling discovery by Kaiser Aluminum & Chemical Corp ,

Date		Proceedings
1974		
		Notice of Motion & Memorandum in support, filed.
	Dec 19	Deft Kaiser Aluminum & Chemical Corporation's memorandum in opposition to plff's motion for Order compelling discovery, filed.
1975		
	Jan 7	Plff's reply memo. in support of motion to compel discovery, filed.
	Jan 8	Original record returned from U.S.C.A.
	Jan 8	Certified copy of Order from U.S.C.A. that appelle's motion to dismiss apppeal pursuant to Rule 54(b), F.R.A.P. is granted etc., filed. Aldisert
	Jan 28	Order compelling plff to answer discovery, filed. JM 1/29/75 entered and copies mailed
	Jan 3	ORDER reassigning case from Judge Joseph L. McGlynn, Jr. to Judge Edward N. Cahn, filed. VA 2/6/75 entered and copies mailed Conference memorandum, Scuderi, J., filed.
	Jan 7	Order that judgment be entered in favor of the deft, Robert Kennedy and against the plff, Columbia Metal Culvert Co., Inc., filed. JM 2/10/75 entered and copies mailed.
	Jan 4	Plff's notice of appeal, filed. (75-1362)
	Jan 4	Copy of Clerk's notice of appeal to USCA, filed.
	Jan 31	PRETRIAL CONFERENCE, SCUDERI, J.
74	Mar 5	Deft Kaiser Aluminum & Chemical Corp's notice of deposition of Joseph A. Bonjorno, filed.
75	Mar 5	Deft Kaiser Aluminum & Chemical Corp's

Date		Proceedings
1975		
		Second Set of interrogatories to plff, filed.
76	Mar 5	Deft Kaiser Aluminum & Chemical Corp's Second request for the production of documents, filed.
--	Mar 6	Bond for costs on appeal in the sum of $250.00 with Transamerica Insurance Co. as surety, filed.
77	Mar 7	Plff's interrogatories-Second Set to deft Kaiser Aluminum & Chemical Corp., filed.
78	Mar 10	Appellant's statement pursuant to Rule 10, Federal Rules of Appellate Proceudre, filed.
--	Mar 20	PRETRIAL CONFERENCE, CAHN, J.
79	Mar 24	Conference memorandum, filed.
--	Mar 25	Original record transmitted to USCA. Except papers #43,62,63,67,70,49, and 79.
80	Apr. 4	Deposition of Robert A. Kennedy, filed.
81	Apr. 7	Answers of Kaiser Aluminum & Chemical Corp. to plff's interrogatories-Second Set, filed.
82	Apr. 7	Objections of Kaiser Aluminum & Chemical Corp. to plff's interrogatories-Second Set, filed.
83	Apr. 8	Plff's answers and objections by Columbia Metal Culvert Co., Inc. to Kaiser Aluminum interrogatories-Second Set, filed.
84	May 20	Motion of Kaiser Aluminum & Chemical Corp. for a protective order, notice and memorandum in support, filed.
85	May 20	Plff's response to motion of Kaiser Aluminum & Chemical Corp. for Protective order, filed.
86	May 30	Interrogatories of deft Kennedy Culvert to plff-First Set, filed.
--	June 9	First supplemental record transmitted to

Date		Proceedings
1975		
		USCA. Papers 70, 79 and 80 thru 83 inclusive.
87	June 19	Plff's supplemental answers to interrogatories, filed.
88	Jul 17	Plff's notice of deposition of Kaiser Aluminum & Chemical Corp., etc., filed.
89	Jul 17	Plff's request for production of documents, Second Set as to deft Kaiser Aluminum & Chemical Corp., filed.
90	Jul 25	Plff's motion to amend complaint, notice and memorandum of law in support, filed.
91	Jul 25	Memorandum of Kaiser Aluminum & Chemical Corp. in opposition to motion to amend plff's complaint, filed.
92	Jul 31	Stipulation and Order as follows. Upon representation by counsel for Kaiser Industries Corp., that if Kaiser Industries Corp. were to respond to plff's request for documents, First Set, Request #1 it would respond that it does not have any such documents, etc. and Kaiser Industries Corp. is dropped as a party deft and Kaiser Aluminum & Chemical Sales Inc. is added as a party deft, filed. EC
93	Aug 8	Memorandum of ldefts Robert A. Kennedy and Kennedy Culvert and Supply Co. in opposition to the filing of an amended complaint, filed.
94	Aug. 13	Deft, Kaiser Aluminum & Chemical Corp.'s notice of deposition of Phila. National Bank by Mr. Alex Gusdorff, et al, filed.
--	Aug. 14	Second supplemental record transmitted to USCA. (Not including FPaper #91 & 93
95	Aug. 18	Plff's reply brief in support of motion to amend complaint, filed
96	Sept. 4	Memorandum in response to Letter from

Date		Proceedings
1975		
		Richard P. McElroy, Esq. of 8/22/75, filed.
97	Sept. 23	Certified copy of Order from USCA that appellee's motion to remand appeal is DENIED, filed.
98	Sept. 30	Plff's notice of deposition of Mr. James Caterina, filed.
99	Oct. 1	Plff's answers to interrogatories of deft Kennedy Culvert, First Set, filed.
100	Oct. 29	Plff's notice of deposition of Mr. Larry Lawrence, filed.
101	Nov. 26	Deft, Kaiser Aluminum and Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc.'s notice of deposition of George Kerr, filed.
102	Dec. 11	Certified copy of Order received from USCA that the judgments of this Court entered 9-9-74, 10-7-74 and 2-6-75 are REVERSED: Costs taxed against appellee, filed.
--	Dec. 11	Record on appeal and two supplements returned.
103	Dec. 24	Memorandum of deft Robert A. Kennedy in support of motion to dismiss for improper venue, filed.
1976		
104	Jan. 7	Plff's notice of deposition of David Thomas, filed.
105	Jan. 16	Plff's memorandum opposing motion of Robert A. Kennedy to dismiss for improper venue, filed.
106	Feb. 11	ORDER that deft Robert A. Kennedy's motion to dismiss for improper venue is DENIED, filed. EC 2-12-76 entered and copies mailed.
107	Feb. 24	Deposition of Lonsdale R. Lawrence, filed.

	Date	Proceedings
	1976	
108	Mar. 5	Answer of deft., Robert A. Kennedy, filed.
109	Mar. 8	Defts. Robert A. Kennedy et al's notice of taking deposition of Frank Sagendorph, filed.
110	Mar. 17	Plffs notice of deposition of Mr. Ed Rowe, filed.
111	Mar. 25	ORDER that plff's; motion to amend complaint is Granted, and the proposed amended complaint, Exhibit A shall be considered asan amended and supplemental complaint and shall be filed with the title "Amended and supplemental complaint", etd., filed. EC. 3-26-76 entered and copies mailed.
	Mar. 25	AMENDED AND SUPPLEMENTAL COMPLAINT FILED.
112	Apr. 9	Defts, Kennedy and Kennedy Culvert and Supply's amended notice of deposition of Frank Sagendorph, filed.
113	Apr. 30	Answer of Kaiser Aluminum and Chemical Corp. and Kaiswer Aluminum and Chemical Sales, Inc. to amended and supplemental complaint filed.
114	May 3	Answer of deft, Robert A. Kennedy and Kennedy Culvert and Supply Co. to plff's amended complaint, filed.
115	Jun. 24	Deposition of Edward A. Rowe, Jr., filed.
116	July 9	Deft's, Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc.'s notice of deposition of Kerr Concrete Pipe Co., Inc. etc., filed.
117	July 12	Defts, Kaiser Aluminum & Chemical Corp. et al's notice of deposition of Reynolds Metals Co., etc., filed.
118	June 18	Defts, Kaiser Aluminum & Chemical Corp.

	Date	Proceedings
	1976	
		et al's notice of deposition of Aluminum Co. of America, filed.
119	Aug. 17	Plff's supplemental answers to Kaiser Aluminum's interrogatories, Second Set, filed.
120	Aug. 23	Deposition of Claron E. Parker, filed.
121	Sept. 7	Interrogatories of deft, Kennedy Culvert & Supply Co. to plff, Second Set, filed.
122	Sept. 21	Stipulation of counsel re: entry of Confidentiality Order, filed.
[122]	Sept. 23	CONFIDENTIALITY ORDER that certain documents shall be filed confidentially, etc., filed. EC 9-24-76 entered and copies mailed.
123	Oct. 8	Rule 37 motion to compel Kennedy Culvert & Supply Co. to produce financial statements by plff with memorandum in support, filed.
124	Oct. 8	Plff's interrogatories to defts re expert testimony, filed.
125	Oct. 15	Plff's answers to interrogatories of deft, Kennedy Culvert & Supply Co., Second Set, filed.
126	Nov. 2	Answer of Robert A. Kennedy and Kennedy Culvert & Supply Co. to plff's third set of interrogatories, filed.
127	Nov. 16	Answers of Kaiser Aluminum & Chemical et al to plff's interrogatories re Expert Testimony, filed.
128	Nov. 22	Plff's motion under Rule 37 to compel Kennedy Culver t& Supply Co. to produce financial statment, notice and memorandum of law, filed.
129	Nov. 22	Deft, Kennedy Culvert & Supply Co.'s memorandum of law in opposition to plff's Rule 37 motion, filed.

	Date	Proceedings
	1976	
130	Nov. 30	ORDER that all discovery shall be completed by 12-31-76; a pretrial conference will be held on 1-18-77 at 9:15 am. and this action is set for jury trial during the month of February, 1977, filed. 12-1-76 entered - - copies mailed.
131	Dec. 1	Plff's interrogatories, First Set to deft, Kennedy Culvert & Supply Co., filed.
132	Dec. 1	Plff's requests for admissions to deft, Kaiser Aluminum & Chemical Corp., filed.
133	Dec. 1	Plff's request for admission to Kaiser Aluminum & Chemical Sales, Inc., filed.
134	Dec. 7	Plff's notice of deposition of C. E. Parker, filed.
135	Dec. 8	Plff's memorandum in opposition to motions of Kennedy Culvert & Supply Corp., filed.
136	Dec. 8	Deft, Kennedy Culvert's motion to compel plff to answer depositions questions pursuant to F.R.C.P.37(a)(2) and notice thereof, filed.
137	Dec. 8	Defts, Robert A. Kennedy and Kennedy Culvert & Supply Co.'s motion to compel plff to answer interrogatories with notice thereof, filed.
138	Dec. 8	Memorandum of law of defts, Robert A. Kennedy and Kennedy Culvert & Supply Co. in support of their motion to compel plff to be deposed and; to respond to questions on the issue of damages, filed.
139	Dec. 8	Defts, Robert A. Kennedy and Kennedy Culvert & Supply Co.'s memorandum of law in support of their motion to compel answers to interrogatories, filed.
140	Dec. 8	Motion of defts Robert A. Kennedy and Kennedy Culvert & Supply Co. to compel

	Date	Proceedings
	1976	
		plff to be deposed and to respond to questions of the issue of damages pursuant to F.R.C.P. 37 with notice thereof, filed.
141	Dec. 8	Memorandum in support of motion of deft, Kennedy Cuvlvert's for order compelling discovery, filed.
142	Dec. 17	Motion of Kaiser Aluminum & Chemical Corp. for a protective order vacating Columbia Metal Culvert Co., Inc.'s notice of deposition of C. E. Parket, notice and memorandum of law in support; thereof, filed.
143	Dec. 27	Plff's memorandum in opposition to motion for protective order re deposition of C. E. Parker, filed.
144	Dec. 30	Response of Kaiser Aluminum & chemical Sales, Inc. to plff's requests for admissions, filed.
145	Dec. 30	Response of Kaiser Aluminum & Chemical Corp. to plff's requests for admissions, filed.
	1977	
146	Jan. 4	Supplemental answer of plff to deft's expert interrogatories, filed.
147	Jan. 7	Deft's notice of deposition of Ellis Veiser et al, filed.
148	Jan. 17	Supplemental answers of Kaiser Defts to plff's interrogatories re: Expert Testimony, filed.
149	Jan. 18	Plff's motion for protective order re: depositions of Ellis Viezer and Roy Elam, notice and memorandum of law in support, filed.
150	Jan. 18	Plff's notice of deposition of Carlos Chafin, filed.
151	Jan. 21	Answers of deft, Kennedy Culvert & Supply

Date		Proceedings
1977		
		Co. to plff's interrogatories — First Set, filed.
152	Jan. 26	ORDER that this action is removed from the Feb. Trial list and placed on the March list: a further pretrial conference will be held on 3-9-77 at 9:15 a.m.; trial briefs and written requests for instructions to the jury shall be filed by 3-7-77; discovery is reopened and shall conclude on 3-1-77; plff may take the further deposition of C. E. Parker, etc. and Kennedy Culvert & Supply Corp.'s Rule 37 motions are Granted, etc., filed. EC 1-27-77 entered and copies mailed.
153	Feb. 3	Plff's notice of deposition of Dr. Horace I. DePodwin, et al, filed.
154	Feb. 16	Deft, Kennedy Culvert & Supply Co., Inc.'s notice of deposition of Richard Sullivan, filed.
155	Feb. 16	Deft, Kennedy Culvert & Supply Co., Inc.'s notice of deposition of Clifford Rossignol, filed.
156	Feb. 16	Defts, Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc.'s notice of deposition of the Monarch Machine Tool, Co. by Urban Buschur, filed.
157	Feb. 22	Plff's notice of deposition of Thomas Melrose, filed.
158	Feb. 23	Plff's notice of deposition of Urban Buschur, filed.
159	Feb. 25	Motion of Plff. for Protective Order re: Depositions of Richard Sullivan and Clifford Rossignol, Notice of, Notice of, Memorandum of Law in support thereof, filed.
160	Feb. 28	Stipulation and Order that transcript of testimony of any employee of U.S Economic

Date		Proceedings
1977		
		Development Administration, etc. shall be designate "CONFIDENTIAL MATERIALS, filed. 3/1/77 entered.
161	Feb. 28	ORDER AMENDING paragraph 2 of the Order filed on 1/26/77 etc., filed 3/1/77 Entered and Copies Mailed
162	Mar. 3	Plff's second suppl. answers to interrogatories, filed.
163	Mar. 8	Videotape deposition of Thomas Melrose, filed.
164	Mar. 8	Plff's notice of deposition of Ken Boedecker, et al, filed.
165	Mar. 15	Plff's trial brief, filed. (Filed under SEAL)
166	Mar. 17	Stipulation of counsel re: Confidentiality Order and ORDER re: the Confidentiality of certain documents, etc., filed. EC 3-17-77 entered and copies mailed.
167	Mar. 17	ORDER that following a PRETRIAL CONFERENCE on 3-11-77 all discovery shall be closed on 3-18-77, etc.; the trial shall be bifurcated with a trial on the issue of liability and a trial on the issue of damages: the parties shall select a jury on 4-11-77, etc., filed. EC 3-18-77 entered and copies mailed.
168	Mar. 18	Plff's notice of deposition of Ken Boedecker, filed.
169	Mar. 21	Plff's notice of deposition of Ken Boedecker, filed.
170	Mar. 21	Plff's preliminary requests for instructions to the jury, filed.
171	Mar. 21	Plff's third supplemental amended answer to

Date		Proceedings
1977		
		Kaiser Aluminum & Chemical corp.'s interrogatories #24, 27 and 28 re: Damages, etc., filed.
172	Mar. 22	Deposition of Carlos H. Chafin taken on behalf of plff, filed.
173	Mar. 28	Plff's motion for reconsideration of the Court's Order of 3-17-77 notice and memorandum of law in support, filed.
174	Apr. 1	Statement of facts of defts, R. A. Kennedy and Kennedy Culvert, filed.
175	Apr. 1	Motion of defts, Robert A. Kennedy and Kennedy Culvert & Supply Co. for partial summary judgment, filed.
176	Apr. 1	Memorandum of Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. in opposition to plff's motion for reconsideration of the Court's Order of 3-17-77, filed.
177	Apr. 1	Trail brief of defts, Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc., filed.
178	Apr. 4	Plff's notice of deposition of Robert L. Price, filed.
179	Apr. 4	Plff's supplemental memorandum in support of motion for reconsideration of Order of 3-17-77, filed.
180	Apr. 5	Motion of Kaiser Aluminum & Chemical Corp. for a protective order, notice and memorandum of law in support, filed.
181	Apr. 5	Affidavit of Robert L. Price re: motion of defts, Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. for partial summary judgment, filed.
182	Apr. 7	Videotape deposition of Ken Boedecker, filed.

Date		Proceedings
1977		
183	Apr. 7	Plff's supplemental answers to interrogatories dated 4-4-77, filed.
184	Apr. 7	Motion of defts, Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. for partial summary judgment, notice, with memorandum of law and appendix in support, filed.
185	Apr 11	Memorandum of defts, Kais er Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. in support of withdrawing from the jury the question of relevant product market with appendix, filed.
186	Apr 11	Plff's motion to strike affidavit of Robert L. Price, filed.
187	Apr 11	Plff's designation of genuine issues of material fact for trial with record support re: Kaiser motion for partial summary judgment, filed.
188	Apr 11	Deposition of Richard L. Sullivan, filed.
189	Apr 11	Deposition of Clifford J. Rossignol, filed.
190	Apr 11	Deposition of Holmes Collins, Three Volumes, filed.
191	Apr 11	Deposition (Videotape) of Thomas Melrose, filed.
192	Apr 11	Deposition of David C. Thomas, filed.
193	Apr 11	Deposition of James Caterina, filed.
194	Apr 11	Continuing deposition of Claron E. Parker on 2-23-77, filed.
195	Apr 12	CIVIL JURY TRIAL on 4-11-77: Jury called and sworn, filed. EC
196	Apr 12	Deposition of Joseph A. Bonjourno, filed.
197	Apr 13	Trial resumes on 4-12-77, filed. EC
199	Apr 13	Testimony of Joseph A. Bonjorno on 4-13-77, filed.

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200	Apr 13	Deposition (Video) of Kenneth Boedecker, filed.
201	Apr 13	Copy of deposition of Robert A. Kennedy, filed.
202	Apr 13	Deposition of Philip C. Buchy, Jr., filed.
203	Apr 14	Trial resumes on 4-13-77 - - witnesses sworn, filed. EC
204	Apr 15	Trial resumes on 4-14-77, filed. EC
205	Apr 15	Deposition of Joseph A. Bonjorno, filed.
206	Apr 18	Affidavit of Lee Rosengard re service of subpoena on Edward Mackin on 4-14-77, etc. filed.
207	Apr 18	Affidavit of Lee Rosengard re service of subpoena on Julius J. Luchinsky on 4-14-77, etc., filed.
208	Apr 18	Affidavit of Deborah Dupler re service of subpoena on Frank E. Sagendorph, III, on 4-9-77, etc., filed.
209	Apr 18	Deposition of Richard L. Sullivan, filed.
210	Apr 19	Deposition of Frank Elijah Sagendorph, III, filed.
211	Apr 19	Trial resumes on 4-15-77, filed. EC
212	Apr 19	Trial resumes on 4-18-77, filed. EC
213	Apr 20	Trial resumes on 4-19-77, filed. EC
214	Apr 20	Affidavit of Lee Rosengard re: service of subpoena on Bart Flannery on 4-15-77, filed.
215	Apr 20	Affidavit of Lee Rosengard re: service of subpoena on Charles Gianusso on 4-15-77, filed.
216	Apr 20	Affidavit of Lee Rosengard re: service of subpoena on Ernest Lo Furno on 4-15-77,; filed
217	Apr 20	Affidavit of Lee Rosengard re: service of subpoena on Victor Pangia on 4-15-77, filed.
218	Apr 20	Affidavit of Lee Rosengard re: service of

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		subpoena on R. W. Krauss on 4-15-77, filed.
219	Apr 20	Affidavit of Lee Rosengard re: service of subpoena on Martin Ettorre on 4-15-77, filed.
220	Apr 21	Trial resumes on 4-20-77, filed.
221	Apr 25	Trial resumes on 4-21-77, filed. EC
222	Apr 26	Trial resumes on 4-25-77, filed. EC
223	Apr 27	Trial resumes on 4-26-77, filed. EC
224	Apr 28	Motion of defts, Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. for a directed verdict pursuant to Rule 50(a), and memorandum of law in support, filed.
225	Apr 28	Trial resumes on 4-27-77, filed. EC
226	May 2	Transcript of testimony on 4-12-77, filed.
227	May 2	Transcript of testimony on 4-13-77, filed.
228	May 2	Transcript of testimony on 4-14-77, filed.
229	May 2	Transcript of testimony on 4-15-77, filed.
230	May 2	Transcript of testimony on 4-18-77, filed.
231	May 2	Transcript of testimony on 4-19-77, filed.
232	May 2	Transcript of testimony on 4-20-77, filed.
233	May 2	Transcript of testimony on 4-21-77, filed.
234	May 2	Transcript of testimony on 4-25-77, filed.
235	May 2	Transcript of testimony on 4-26-77, filed.
236	May 2	Transcript of testimony on 4-27-77, filed.
237	May 2	Transcript of testimony on 4-28-77, filed.
238	May 2	Trial resumes on 4-28-77, filed. EC
239	May 2	Trial resumes on 5-2-77 - - Rule 50 motion by defts is GRANTED and Judgment to be entered in favor of the defts and against the plff, filed. EC
240	May 2	ORDER that judgment is entered in favor of the defts, Kaiser Industries Corp. et al and against the plff, Columbia Metal Culvert Co., Inc., filed. EC.Clk

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		5-3-77 entered and copies mailed.
241	May 3	Transcript of 5-2-77, filed.
242	May 11	Defts, Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, INc.'s Bill of Costs with affidavit in support, filed.
243	May 12	Plff's objection to Bill of Costs, filed.
244	May 19	Defts, Robert A. Kennedy and Kennedy Culvert & Supply Co.'s Bill of Costs with affidavit in support, filed. (77-1846)
245	May 20	Plff's notice of appeal and certificate of service, filed.
		5-23-77 entered and copies to: USCA, C. Hodgson & Blank, Rome, Klaus and Comisky
246	May 20	Copy of Clerk's Notice of appeal to USCA, filed.
247	May 24	Plff's objections to Bill of Costs of defts Robert A. Kennedy and Kennedy Culver t & Supply Co., filed.
248	June 9	Deposition of Robert A. Kennedy on 5-7-75, filed.
--	June 9	Original record transmitted to USCA. Not including papers #43, 62, 63, 67, 97, 128, 199, 242, 243, 244, 247, (#49 and 198--no paper assigned), (#163 and 182--Video Tape Depositions). (Paper #165 is UNDER SEAL).
--	July 1	Bond for Costs on Appeal in the sum of $250 with Fidelity and Deposit Co. of Maryland as surety, filed.
249	July 20	MEMORANDUM OPINION, Cahn, J., filed. (22 pags.) EC
		7-21-77 entered and copies mailed.
--	July 22	Fir.t supplemental record transmitted to

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		USCA. (Record includes only paper #249)
250	Dec 28	Index to plff's trial exhibits, filed.
--	Dec 29	Second supplemental record transmitted to U.S.C.A. (Exhibits--Plff's Trial Exhibits #3, 4, 5, 8A, 10, 11, 13, 15, 16, 21, 22, 24, 30, 75, 76, 78, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 100, 101, 109, 110, 116, 117, 133, 139, 140, 143, 144, 145, 146, 151A, 152, 154, 155, 159, 160, 161, 162, 169, 170, 177, 179, 182, 182A, 184, 186, 188, 189, 194, 195, 199, 200, 201, 202, 203, 221, 222, 226, 227, 229, 257, 259, 263, 267A, 272A, 273, 274, 275, 276, 277, 278, 280, 281, 282, 283, 284, 287, 288, 549, 732G, 865, 916, 917, 924, 940, 947, 948, 950, 951, 954, 955, 956, 957, 962, 966 and 969: P-196, P-197, P-200, P-211, P-201, P-202, P-212, P-226, P-227, P-840, P-839, P-842, P-841, P-838, P-837, P-836, P-838B, P-2001, P-2002, P-2003 a & b, P-2006-2008, P-2009 a & b, P-2011-2013, P-2016, P-2018, P-2021, P-2028, P-2030, P-2031A, P-2032, P-2033, P-2034, P-2035, P-272, P-272 a, b & c, P-288, P-823, P-230, P-262, P-264, P-268, P-290, P-2036, P-2036A, P-2037 and P-2038.)
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251	Mar 21	Certified copy of Order from U.S. Court of Appeals GRANTING appellant's motion for leave to the District Court to correct the record in accordance with Rule 60(a), by changing Mr. Arvay's answer on page 1550 of the trial transcript from "Yes, really," to "Yes, rarely." filed.
252	July 7	Certified copy of Order U.S. Ct. Appeals,

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		dated 7/6/78 that motion of appellant Columbia Metal Culvert Co., Inc. for reconsideration and vacation or modification of the Order of 6/29/78 et al., is denied, filed.
253	Jul 26	Plff's Motion for Pretrial Conference & for Preliminary Injunction, Notice, & Memorandum in support of both Motions, filed.
254	Jul 26	Deft's Memorandum in opposition to Plff's Motions, filed.
255	Aug 4	Affidavit of William H. Roberts, filed.
--	Oct 12	ORIGINAL RECORD and 2 supplements returned; Trial Transcript Nos. 227, 229, 230, 235 & 236, plft's. exhibits marked P-288 and impounded document No. 165 will be returned when they are received back from U.S. Supreme Court; petition for certiorari was denied 10/2/78.
256	Oct 12	Certified copy of ORDER that the judgment of the district court filed 5/2/77 is affirmed as to defts. Kennedy Culvert and Robert Kennedy; as to KACC and KACSI, judgment of the District Court is affirmed insofar as it granted a directed verdict against plfts. on the Clayton Act claims; the remainder of said judgment of the District Court is reversed, and the cause remanded for action consistent with the opinion of the U.S. Court of Appeals, filed. USCA
--	Oct 18	Trial transcripts Nos. 227, 229, 230, 235 and 236, plft's. exhibits marked P-288 and impounded document No. 165 received from U.S. Court of Appeals.
257	Oct 20	ORDER, that the case be reassigned from the calendar of Judge Edward N. Cahn to the calendar of Judge Norma L. Shapiro,

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		filed. JL/clk 10/20/78 entered & copies mailed
258	Oct 20	Plft's. supplemental rule 34 request for production of documents, filed.
259	Oct 20	Plft's. renewed motion for pretrial conference, notice, renewed motion for preliminary injunction, memorandum, filed.
260	Oct 20	ORDER that case be reassigned from the calendar of Judge Edward N. Cahn to the calendar of Judge Norma L. Shapiro, filed. JS/mek 10/23/78 entered & copies mailed.
261	Oct 24	Memorandum of Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. in opposition to plft's. meotion for a preliminary injunction, filed.
262	Oct 26	Plft's. reply brief, filed.
263	Nov 7	Plft's. supplemental brief, with affidavit of Joseph A. Bonjorno, filed.
264	Nov 9	Report of pretrial conference, Shapiro, J.
--	Nov 9	PRETRIAL CONFERENCE HELD, Shapiro, J.
265	Nov 10	ORDER, dated 11/10/78 that discovery shall be completed by 1/31/79; plft. has leave to file an amended or supplemental complaint, etc., parties shall be ready for pretrial conference and preliminary injunction argument 12/21/78 at 11 AM, Rm. 10614, etc., filed. NS 11/13/78 entered & copies mailed.
266	Dec 7	SECOND AMENDED AND SUPPLEMENTAL COMPLAINT, filed.
267	Dec 19	Defts' notice of deposition of Joseph A. Bonjorno, et al., filed.
268	Dec 21	Deft's. supplemental request for production

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		of documents, set No. 1, filed.
269	Dec 21	Plft's. notice of deposition of Custodian of Records of Reynolds Metals Co., filed.
270	Dec 21	Plft's. notice of deposition of Walter R. Haidet, et al., filed.
271	Dec 21	Plft's. notice of deposition of Custodian of Records of Kennedy Culvert & Supply Co., filed.
272	Dec 27	Report of Pretrial conference of 12/21/78, filed.
273	Dec 28	STIPULATION AND ORDER DATED 12/21/78 THAT THE TIME IN WHICH DEFTS. MAY ANSWER, MOVE OR OTHERWISE RESPOND TO THE SECOND AMENDED COMPLAINT IS EXTENDED UNTIL 1/7/79, FILED. 12/28/78 entered and copies mailed
274	Dec 28	ORDER THAT A STATUS/SETTLEMENT CONFERENCE WILL BE HELD ON 2/5/79 AT 4:30 PM. PLFF'S MOTION FOR PRELIMINARY INJUNCTION IS WITHDRAWN, PLFF. WILL PROVIDE THE COURT AND OPPOSING COUNSEL WITH INFORMATION ON DAMAGES BY 1/31/79. THE COURTS ORDER OF 11/10/78 is modified in that trial is scheduled for 6/5/79 OR SOONER IF POSSIBLE, FILED. NS 12/29/78 entered and copies mailed
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275	Jan 5	ANSWER of defts. Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. to second amended and supplemental complaint, filed.

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276	Jan 5	Defts' notice of deposition of William Bowman, et al., filed.
277	Jan 9	Plft's. amended notice of deposition of Mr. Carlos Chafin, filed.
278	Jan 17	Plft's. notice of deposition of Francis Lombardi, filed.
279	Jan 17	Plft's. notice of deposition of Robert Kennedy, filed.
280	Jan 25	Plft's. response to defts' supplemental request for production of documents – set #1, filed.
281	Jan 25	Stipulation between counsel for plft. and defts. that documents produced by Kennedy Culbert & Supply Co. from 1/15/79 thru the final termination of the action are produced subject to stipulation of confidentiality heretofore executed (Docket No. 40), etc., filed.
282	Jan 30	Defts' supplemental interrogatories, Set No. 1.
283	Jan 31	Defts' supplemental request for production of documents, set No. 2, filed.
284	Jan 31	Plft's. damages statement, filed.
285	Feb 2	Plft's. supplemental request for documents, filed.
286	Feb 2	Plft's. amended damages statement (Feb. 1, 1979), filed.
287	Feb 7	Plft's. objection to deft's. supplemental interrogatories, set No. 1, filed.
~~288~~	~~Feb 14~~	~~PLFT'S. MOTION FOR ORDER COMPELLING DEFTS. TO PRODUCE DOCUMENTS, NOTICE, MEMORANDUM, filed.~~ (see Paper #293)

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289	Feb 14	DEFTS' MEMORANDUM IN OPPOSITION TO PLFT'S. MOTION FOR AN ORDER COMPELLING DEFTS. TO PRODUCE DOCUMENTS, filed.
290	Feb 20	Plft's. memorandum in opposition to bill of costs of Robert A. Kennedy and Kennedy Culvert & Supply Co., filed.
291	Feb 22	Report of pretrial conference, Shapiro, J., filed.
--	Feb 22	PRETRIAL CONFERENCE HELD 2/15/79, Shapiro, J.
292	Feb 23	ORDER, DATED 2/22/79, THAT DISCOVERY SHALL BE COMPLETED BY 3/15/79, ETC., FINAL PRETRIAL CONFERENCE TO BE HELD 4/20/79 at 4:30 PM, ETC., filed. NS 2/23/79 entered & copies mailed.
293	Feb 23	ORDER, DATED 2/22/79, THAT MOTION, DOCKET #288 SHALL BE STRICKEN AND RETAINED UNDER SEAL, ETC., filed. NS 2/23/69 entered & copies mailed.
294	Feb 27	Letter dated 2/21/79 to Chief Deputy Clerk, Mr. Kunz, from Lee A. Rosengard Esq Re: Taxation of costs, etc., filed
295	Feb 27	Letter dated 2/26/79 to Chief Deputy Clerk, Mr. Kunz, from Michael M. Baylson Esq., re: Taxation of Costs, etc., filed.
296	Feb 28	Defts' notice of deposition of Howmet Aluminum Corp., filed.
297	Mar 1	Plft's. notice of deposition of Custodian of Records of Reynolds Metals Co., filed.
298	Mar 5	KAISER ALUMINUM & CHEMICAL

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		CORP., ET AL'S. MOTION FOR AN ORDER COMPELLING ANSWERS TO INTERROGATORIES AND COMPELLING PRODUCTION OF DOCUMENTS, NOTICE, MEMORANDUM, filed.
299	Mar 9	PLFT'S. MEMORANDUM IN OPPOSITION TO DEFT'S. MOTION FOR ORDER COMPELLING ANSWERS TO INTERROGATORIES AND PRODUCTION OF DOCUMENTS, filed.
300	Apr 20	Report of pretrial conference, Shapiro, J., filed.
--	Apr 20	PRETRIAL CONFERENCE HELD, Shapiro, J.
301	Apr 26	ORDER DATED 4/24/79 THAT COUNSEL FOR PLFT. SHALL DESIGNATE PAGES OF DEPOSITIONS HE INTENDS TO OFFER AT TRIAL BY 6/1/79, ETC., A STATUS CONFERENCE WILL BE HELD 6/4/79 at 4 PM, filed. NS 4/27/79 entered & copies mailed.
302	May 17	PLFF'S MOTION FOR ORDER COMPELLING DISCOVERY, NOTICE, MEMORANDUM FILED.
303	May 17	DEFTS' MEMORANDUM IN OPPOSITION TO PLFT'S. MOTION TO TAKE DEPOSITIONS OF EXPERT WITNESSES, filed.
304	May 25	Plft's. answer to defts' supplemental interrogatory #1, filed (UNDER SEAL) (placed in lockup)
305	May 30	PLFT'S. REPLY BRIEF IN SUPPORT OF MOTION FOR ORDER COMPELLING DISCOVERY (DEFTS' EXPERTS), filed.
306	June 1	Plft's. designation of deposition testimony for

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		use at trial, filed.
307	June 6	ORDER, DATED 6/5/79 THAT PLFT'S. MOTION TO DEPOSE DEFTS' EXPERT WITNESSES WITHOUT COSTS IS DENIED; DEFTS. ARE ORDERED TO SUPPLEMENT THEIR ANSWERS TO PLFT'S. EXPERT INTERROGATORIES., ETC., THE COURT WILL HOLD A PRETRIAL CONFERENCE ON 7/5/79 at 9:30 A.M., ETC., filed. 6/7/79 entered & copies mailed.
308	June 7	Report of pretrial conference, Shapiro, J., filed.
--	June 7	PRETRIAL CONFERENCE HELD 6/4/79, Shapiro, J.
309	June 8	Plft's. notice of depositions of James Hobby, et al., filed.
310	June 15	Deposition of David C. Jones, filed.
311	June 29	Plft's. supplemental designations of deposition testimony, filed.
312	June 29	Defts' counter-designation of testimony for use at trial, filed.
313	July 3	Defts' supplemental designation of deposition testimony for use at trial, filed.
314	July 5	Plft's. motion for sanctions, filed.
315	July 5	Plft's. proposed questions on voir dire, filed.
316	July 5	Plft's. proposed interrogatories to jury, filed.
317	July 5	Plft's. supplement to second final pretrial order, filed.
318	July 5	Plft's. preliminary requests for instructions to the jury, filed
319	July 5	Plft's. supplemental trial brief, filed.
320	July 6	Deft's Kaiser Aluminum & Chemical Corp., et al's requested jury instructions, filed.
321	July 6	Supplemental answers of Kaiser Deft's to

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		plff's interrogatories re: expert testimony, filed.
322	July 6	Preliminary proposed form of special verdict of deft's Kaiser Aluminum & Chemical Corp., et al, filed.
323	July 12	PLFT'S. MOTION FOR PRECLUSION ORDER OR OTHER SANCTIONS, NOTICE, MEMORANDUM, filed.
324	July 13	Plft's. amended damage statement 7/13/79, filed.
325	July 13	Plft's. tentative order of witnesses, filed.
326	July 13	DEFTS' MEMORANDUM IN OPPOSITION TO PLFT'S. MOTION FOR PRECLUSION ORDER AND OTHER SANCTIONS, filed.
327	Jul 13	DEFTS' KAISER ALUMINUM & CHEMICAL CO. MOTION IN LIMINE & MEMORANDUM IN SUPPORT, filed
328	Jul 13	DEFTS " witnesses, filed
329	Jul 13	CLERK'S TAXATION OF COSTS, RE THAT JUDGMENT IS ENTERED IN FAVOR OF DEFTS' ROBERT A. KENNDEY AND KENNEDY CULVERT & SUPPLY CO. AND AGAINST THE PLFF. COLUMBIA METAL CULVERT IN THE AMOUNT OF $4,647.64, filed MEK 7/16/79 entered & copies mailed
330	Jul 16	Deposition of James B. Hobby, filed
331	Jul 17	PLFF'S MOTION FOR ORDER COMPELLING PRODUCTION OF DOCUMENTS & MEMORANDUM OF LAW, filed
332	Jul 17	Plff's notice of taking deposition of Barbara Epstein, filed

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333	Jul 17	Additional plff's exhibits re; William Arvay, filed
334	Jul 17	Plff's objections to counter-designations by deft. H.T. Collins testimony, filed
335	Jul 17	Plff's memorandum of law, filed
--	Jul 5	Report of pre-trial conference, SHAPIRO, J.
336	Jul 18	PRE-TRIAL CONFERENCE, SHAPIRO, J, filed
337	Jul 18	CIVIL JURY TRIAL, jury called & sworn on 7/17/79, on issue of liability – bifurcated, filed NS
338	Jul 19	Oral deposition of Robert A. Kennedy, filed.
339	Jul 19	Deposition of Kenneth Richard Lally, filed.
340	Jul 19	Deposition of Walter R. Haidet, filed.
341	Jul 19	Deposition of Allan J. Donald, filed.
342	Jul 19	Deposition of Francis T. Lombardi, filed.
343	Jul 19	TRIAL RESUMES 7/18/79, filed.
344	Jul 19	COLUMBIA METAL CULVERT CO., INC.'S. MOTION TO VACATE CLERK'S TAXATION OF COSTS AND FOR A DE NOVO REVIEW OF THE BILL OF COSTS BY THE COURT, filed.
345	Jul 19	Deposition of Carol Herman, filed.
346	Jul 19	Deposition of Carlos H. Chafin, filed.
347.	Jul 20	TRIAL RESUMES ON 7/19/79: Witness continues, filed. (NS)
348.	Jul 20	TRIAL RESUMES ON 7/20/79: Witness continues, filed. (NS)
349	Jul 25	Plff's supplemental designation, counter designation of deposition testimony and objections to designations, filed.
350	Jul 25	TRIAL RESUMES ON 7/23/79, witnesses sworn, trial continues, filed (NS)
351	Jul 26	TRIAL RESUMES 7/24/79, filed.

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352	Jul 26	PLFF'S MOTION FOR ORDER TO PRODUCE DOCUMENTS & MEMORANDUM OF LAW, filed
353	Jul 27	Praecipe for writ of execution as to Kaiser Aluminum & Chemical Corp et al, filed
–	Jul 27	Writ Exit.
354	Jul 27	MOTION AND ORDER SPECIALLY APPOINTING C. CLARK HODGSON TO SERVE WRIT, FILED. 7/27/79 entered & copies with writ to counsel MEK-CLK
355	Jul 27	Interrogatories in attachment to Kaiser Aluminum & Chemical Corp et al, filed.
356	Jul 27	TRIAL RESUMES, witnesses sworn 7/25/79, filed
357	Jul 30	TRIAL RESUMES, trisl continued as of 7/26/79, filed
358	Jul 30	Deft. Kaiser Alum. & CHemical Corp.'s reply to plff's supplemental trial brief, filed
359	Jul 31	TRIAL RESUMES, witnesses sworn on 7/27/79, filed
360	Aug 1	Memorandum of law of Kaiser Aluminum & Chemical Corp et al regarding Alleged Dam filed
361	Aug 1	Trial of 7/30/79 resumes, filed.
362	Aug 1	Trial of 7/31/79 resumes, filed.
363	Aug 2	MOTION OF KAISER ALUMINUM ET AL FOR A DIRECTED VERDICT PURSUANT TO RULE 50(a), FILED
--	Aug 1	SETTLEMENT CONFERENCE, Shapiro, J.
364	Aug 2	Report of settlement conference, Shapiro, J., filed
365	Aug 3	Trial of 8-1-79 resumes filed.
366	Aug 6	Plff's memorandum in support of motion to

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		exclude defts' exhibits D-3049 thru D-3060 filed.
367	Aug 7	Trial of 8/2/79 resumes, filed.
368	Aug 7	Trial of 8/3/79 resumes, filed.
369	Aug 9	Trial of 8/6/79 resumes filed.
370	Aug 9	Trial of 8/6/79 resumes filed.
371	Aug 9	Defts' memorandum in opposition to request to exclude certain exhibit filed.
372	Aug 10	Trial of 8/8/79 resumes, filed.
373	Aug 13	Kaiser Aluminum & Chemical Corp et al supplemental requests for Jury instructions, filed.
374	Aug 14	Trial of 8/9/79 resumes, filed.
375	Aug 14	Trial of 8/10/79 resumes, filed.
376	Aug 14	Trial of 8/13/79 resumes, filed.
377	Aug 14	Plff's supplemental points for charge — Liabiltiy, filed.
378	Aug 16	Trial resumes on 8-14-79, filed.
379	Aug 16	Trial resumes on 8-15-79, filed.
380	Aug 16	ORDER DATED 8-16-79 THAT THE U.S. MARSHAL FURNISH LUNCH FOR 11 JURORS AND ONE DEPUTY MARSHAL, FILED. NS.Clk 8-17-79 entered
381	Aug 17	Plff's supplemental points and authorities re: Damages, filed.
382	Aug 17	Plff's supplemental points for charge — Damages, filed.
383	Aug 17	Interrogatories to the jury filed.
384	Aug 17	Jury trial resumes (8/16/79); Deputy Marshal sworn; verdict by answering interrogatories in favor of pltf; trial on issue of damages to be held on 8/17/79, filed.
385	Aug 22	Trial resumes (7/20/79), filed.
386	Aug 22	Trial resumes & 7/21/79); deputy marshal sworn; verdict on damages by answering interrogatories, filed.

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387	Aug 22	Trial resumes (8/17/79), filed.
388	Aug 22	Interrogatories to the jury, filed.
389	Aug 22	ORDER DATED 8/21/79 THAT POST-TRIAL MOTIONS ARE TO BE FILED WITHIN 10 DAYS AFTER ENTRY OF JUDGMENT; THAT MEMORANDUMS OF LAW IN OPPOSITION TO POST-TRIAL MOTIONS MUST BE SERVED & FILED WITHIN 5 DAYS OF SERVICE & FILING OF THE MOVING PARTY'S MEMORANDUM, FILED 8/22/79 entered and copies mailed. NS
390	Aug 22	JUDGMENT DATED 8/21/79 IN FAVOR OF PLTF AND AGAINST DEFTS, KAISER ALUMINUM AND CHEMICAL CORP. & KAISER ALUMINUM & CHEMICAL SALES, INC. IN THE SUM OF $5,445,000.00, FILED. Clk. NS 8/22/79 entered and copies mailed.
391	Aug 27	STIPULATION & ORDER EXTENDING TIME FOR DEFTS TO FILE POST TRIAL MOTIONS & BRIEFS TO 9/19/79, ETC., FILED. NS 8/28/79 entered & copies mailed.
392	Sept 6	Defts' requested jury instructions, filed.
393	Sept 19	DEFTS' MOTION FOR A NEW TRIAL, FILED.
394	Sept 19	DEFTS' MOTION FOR JUDGMENT NOT WITHSTANDING VERDICT, FILED.
395	Sept 20	Deft.'s notice of appeal received 9/20/79 at 2:30 p.m., filed. 9/21/79 copies to:

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		Michael M. Baylson, Esq. Henry T. Reath, Esq. Blank, Rome, Klaus & Cominsky certified copy of docket entries & notice of appeal to U.S.C.A.
--	Sept 20	Bond for costs on appeal in the sum of $250.00 with the Fidelity & Deposit Company of Maryland, filed.
396	Sept 20	Copy of Clerk's notice to U.S.C.A., filed. 9/21/79 copies to: Michael M. Baylson, Esq. Henry T. Reath, Esq. Blank, Rome, Klaus & Cominsky Judge Shapiro Paul Buttery Daniel Spitz
397	Sept 28	DEFTS' MOTION FOR EXTENSION OF TIME FOR TRANSMISSION OF RECORD, FILED.
398	Oct 3	Response of Plff. to motion for new trial and for a judgment notwithstanding the verdict, filed.
399-418	Oct 4	Trial transcripts, 20 volumes, filed.
419-422	Oct 5	Trial transcripts, 4 volumes, filed.
--	Oct 9	ORIGINAL RECORD TRANSMITTED TO U.S.C.A. (Pleadings #43, 62, 63, 67, 165, 199, 235, 260, 274, 293, 304, 330, 340, 341, 342, 389, 393, 394, 397 & 398 not included) (USCA 79-2389)
423	Oct 9	ORDER DATED 10/5/79 THAT DEFTS' MOTION FOR EXTENSION OF TIME FOR TRANSMISSION OF RECORD IS DENIED WITHOUT PREJUDICE, FILED. NS 10/10/79 entered & copies mailed.

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424	Oct 9	Kaiser's reply to Columbia's response to post-trial motions, filed.
425	Nov 14	DEFTS' MOTION FOR SUPERSEDEAS BOND, FILED.
---	Nov 16	Supersedeas bond in the sum of $5,445,000.00 with the Insurance Company of America as surety, with court approval, filed.
(425)	Nov 19	ORDER APPROVING SUPERSEDEAS BOND, FILED. 11/20/79 ENTERED & COPIES MAILED
426	Nov 20	CERTIFIED COPY OF ORDER FROM U.S.C.A. THAT APPELLANTS' MOTION FOR A LIMITED REMAND TO U.S.D.C. JUDGE SHAPIRO FOR THE PURPOSE OF DETERMINING KAISER'S MOTION FOR JUDGMENT NOT WITHSTANDING VERDICT AND MOTION FOR NEW TRIAL FILED BY KAISER, ETC., IS GRANTED., FILED. USCA
--	Nov 20	RECORD ON APPEAL RETURNED.
427	Dec 7	ORDER DATED 12/6/79 THAT DEFTS' BRIEF IN SUPPORT OF POSTTRIAL MOTIONS SHALL BE FILED BY 1/3/80, ETC., FILED. 12/10/79 entered & copies mailed. NS
428	Dec 26	ORDER THAT THE COURT HEREBY RETAXES A JUDGMENT FOR COSTS IN FAVOR OF DEFTS., ROBER A. KEENDY AND KENNEDY CULVERT & SUPPLY COMPANY AND AGAINST PLFF., COLUMBIA METAL CULVERT CO., INC. IN THE SUM OF $4,647.64, filed. 12/27/79 entered & copies mailed. NS

Date		Proceedings
1979		
429	Dec 27	Defts' brief in support of motions for judgment N.O.V. or for a new trial, filed.
1980		
430	Jan 3	ORDER THAT THE ORDER OF DECEMBER 6, 1979, SETTING FORTH A BRIEFING SCHEDULE FOR DEFTS' POST TRIAL MOTIONS, IS MODIFIED IN THAT PLFF'S BRIEF IN OPPOSITION TO DEFTS' POST TRIAL MOTIONS SHALL BE FILED AND SERVED ON OR BEFORE JAN. 18, 1980, AND DEFTS SHALL HAVE TEN (10) DAYS TO FILE AND SERVE A REPLY BRIEF. ORAL ARGUMENT IS SCHEDULED FOR FEB. 27, 1980 AT 4:00 P.M. AS PREVIOUSLY ORDERED, FILED NS 1/3/80 ENTERED & COPIES MAILED
431	Jan 18	Plff's brief in opposition to defts' motions for judgment N.O.V. or for a new trial, filed.
432	Jan 21	Transcript of 8/15/79, filed.
433	Jan 21	Transcript of 8/16/79, filed.
434	Jan 21	Transcript of 8/21/79, filed.
435	Feb 1	Defts' reply brief in support of motions for judgment N.O.V. or for a new trial, filed.
436	May 2	Transcript of 7/20/79, filed.
437	May 12	PLFF'S MOTION FOR SUBSTITUTION OF PARTIES, NOTICE, MEMORANDUM OF LAW FILED.
(437)	May 30	ORDER THAT UPON THE LIQUIDATION AND DISSOLUTION OF COLUMBIA METAL CULVERT CO., INC. JOSEPH A. BONJORNO, GEORGE M. KERR, JR. AND BARBARA K. CLISBY WILL BE SUBSTITUTED AS PARTIES PLFF. IN PLACE OF COLUMBIA

Date		Proceedings
1980		
-		METAL CULVERT CO., INC., ETC., FILED. 6/2/80 entered & copies mailed. NS
438	Jul 25	Writ returned with affidavit of C. Clark Hodgson, Jr., Esq., re: mailed on 8-7-80, filed.
439	Dec 2	ORDER DTD. 12/1/80 THAT A SUPPLEMENTAL ORAL ARGUMENT ON OUTSTANDING MOTIONS WILL BE HELD ON 1/29/81 AT 9:00 A.M, FILED. NS 12/3/80 entered & copies mailed.
440	Dec 5	ORDER THAT ORAL ARGUMENT ON OUTSTANDING MOTIONS SCHEDULED FOR 1/29/81 HAS BEEN CHANGED TO 12/29/80 AT 10:00 A.M. IN CTRM. 10-A, FILED. 12/8/80 entered & copies mailed. NS/clk
441	Dec 23	Pltf's statement of issues for supplemental oral argument, filed.
442	Dec 23	Pltf's appendix to statement of issues for oral argument, filed.
443	Dec 24	Pltf's statement of issues for supplemental oral argument, filed. (revised)
444	Dec 30	ORAL ARGUMENT 12/29/80 SUR: C.A.V., filed.
445	Dec 30	Defts Kennedy & Robert A. Kennedy & Culvery & Supply Co.'s notice of deposition of Joseph A. Bonjorno, filed.
1981		
446	Jan 6	PLTF'S MOTION FOR PROTECTIVE ORDER, NOTICE, MEMORANDUM OF LAW, FILED.
447	Jan 7	Defts' memorandum of law in opposition to pltfs' motion for a protective order,

Date		Proceedings
1981		
448	Jan 13	Pltfs' reply brief in support of Motion for protective order, filed.
449	Jan 21	Pltf, Joseph Bonjorno's objections to request for production of documents attached to notice of deposition, filed.
450	Jan 22	ORDER THAT A CONF. IS SCHEDULEF FOR 2/13/81 AT 9:30 a.m. IN CHAMBERS, FILED. NS/clk 1/22/81 entered & copies mailed.
451	Jan 23	ORDER THAT THE CONF. SCHEDULEF FOR 2/13/81 HAS BEEN CHANGED TO 2/5/81 AT 10:00 a.m. IN CHAMBERS, FILED. NS/clk 1/26/81 entered & copies mailed.
452	May 22	PLFFS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF, NOTICE OF, MEMORANDUM OF, LAW, FILED. (SUPPLEMENTAL BRIEF ATTACHED)
453	may 29	Defts' answer to Motion for Leave to file Supplemental Brief re: J. Truett Payne v Chrysler Motors Corp., filed.
454	May 29	Defts' brief in answer to plffs' supplemental brief, filed.
455	Jun 18	MEMORANDUM, SHAPIRO, J., AND ORDER THAT PLFF'S MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF IS GRANTED, THE MOTION OF KAISER ALUMINUM & CHEMICAL CORP., ET AL FOR JUDGMENT N.O.V. IS GRANTED WITH RESPECT TO THE JURY AWARD OF $57,000 IN RESPONSE TO INTERROGATORY ONE AS TO DAMAGES AND OTHERWISE DENIED, DEFTS MOTION FOR A NEW TRIAL IS GRANTED AS TO DAMAGES ONLY,

Date		Proceedings
1981		
		FIXING 7-17-81 AT 1:00 P.M. FOR A PRE-TRIAL/STATUS CONFERENCE, ETC., FILED. 6-18-81 Entered and copies mailed.
456	Jun 18	ORDER THAT THE CLER OF THE DISTRICT COURT SHALL CERTIFY A COPY OF THE DOCKET ENTRIES TOGETHER WITH THE MEMORANDUM OF 6-17-81 TO THE CLERK OF THE COURT OF APPEALS, THE CLERK OF THE DISTRICT COURT SHALL RETAIN THE RECORD SUBJECT TO THE REQUEST OF THE COURT OF APPEALS PENDING A DECISION ON THE MOTION TO REVOKE LIMITED REMAND, FILED. 6-18-81 Entered and copies mailed.
---	Jun 18	Supplemental record on appeal transmitted to U.S. Court of Appeals
457	Jun 26	Certified copy of order received from U.S.C.A. DENYING THE MOTION OF APPELLEE, COLUMBIA METAL CULVERT CO., INC. TO SUBSTITUTE AS APPELLEES, JOSEPH A. BONJORNO ET AL ETC., FILED 6/29/81 ENTERED & COPY TO JUDGE SHAPIRO
458	Jun 29	PLFF'S MOTION FOR RECONSIDERATION, NOTICE, MEMORANDUM OF LAW, & CERTIFICATE OF SERVICE, FILED.
459	Jul 7	Kaiser's brief in opposition to Columbia's motion for reconsideration, filed.
460	Jul 13	CERTIFIED COPY OF ORDER OF USCA DENYING MOTION OF COLUMBIA

Date		Proceedings
1981		
		METAL CULVERT CO., INC. FOR RETURN OF THE FULL RECORD TO THIS COURT FOR DISPOSITION: GRANTING APPELLANTS MOTION FOR DISMISSAL OF APPEAL, FULL REMAND OF CASE TO DISTRICT JUDGE SHAPIRO WITH CERTAIN INSTRUCTION, AND STAY OF ANY ATTEMPTED EXECUTION BY COLUMBIA ON JUDGMENT BELOW ENTERED ON 8-22-79 IN FAVOR OF COLUMBIA AND AGAINST KAISER UNTIL COURT BELOW HAS ORDERED JUDGMENT OF 8-22-79 VACATED, FILED.
461	Jul 14	Reply brief in support of motion for reconsideration, filed.
462	Jul 16	ORDER VACATION JUDGMENT IN THE SUM OF $5,445,000.00 ENTERED 8-22-79 IN FAVOR OF COLUMBIA METAL CULVERT CO., INC. AND AGAINST KAISER ALUMINUM AND CHEMICAL CORP. AND KAISER AND CHEMICAL SALES, INC., FILED. 7/17/81 ENTERED AND COPIES MAILED.
463	Jul 17	Kaiser's preposed pre-trial procedure for retrial on damages, filed.
464	Jul 24	Plff's memo on procedure at retrial on damages, filed.
465	Jul 24	Plff's proposed statement, filed.
466	Jul 28	Kaiser's memo in opposition to plff's memo on procedure at retrial on damages, fil
467	Aug 6	ORDER THAT PLFF. SHALL SUBMIT STATEMENT ON DAMAGES ON OR BEFORE 8/17/81., DEFT. SHALL FILED

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1981		
		STATEMENT ON DAMAGES ON OR BEFORE 8/27/81., ETC., A PRETRIAL CONFERENCE WILL BE HELD ON 8/19/81 AT 10:00 A.M., FILED. 8/7/81 ENTERED AND COPIES MAILED.
468	Aug 10	PLFFS' MOTION TO WITHDRAW REQUEST FOR INTERLOCUTORY APPEAL, FILED.
469	Aug 31	ORDER THAT PLFFS. MOTION TO WITHDRAW INTERLOCUTORY APPEAL IS GRANTED, FILED. 8/31/81 ENTERED AND COPIES MAILED.
470	Sept 10	Plffs' Pre-Trial statement, re: damages, filed.
471	Sept 14	PLFFS' MOTION FOR PROTECTIVE ORDER, NOTICE, MEMO, FILED.
472	Sept 17	ORDER THAT CASE IS SPECIALLY LISTED FOR TRIAL ON 11/16/81 AT 10:00 A.M., FILED. 9/17/81 ENTERED AND COPIES MAILED.
473	Sept 18	Certificate of service of Michael M. Baylson, esq., re" service of Motion for protective order, filed.
474	Sept 21	Amendments to plffs' pre-trial statement, filed.
475	Oct 6	DEFTS MOTION FOR SUMMARY JUDGMENT AND FOR PRECLUSION OF PROOF OF DAMAGES, MEMO, CERTIFICATE, FILED.
476	Oct 6	PLFFS MOTION TO ADD ONE WITNESS TO PLFF'S WITNESS LIST, MEMO, CERTIFICATE OF SERVICE, FILED.

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1981		
477	Oct 9	Certificate of service of motion of defts for summary judgment, etc. filed.
478	Oct 13	Defts memo, in opposition to motion to add one witness to witness list, filed.
479	Oct 19	Plffs response to motion for summary judgment and for preclusion of proof of damages, filed.
480	Oct 19	Plffs reply brief in support of motion to add one witness to plffs witness list, filed.
481	Oct 19	Plffs offer of proof re: witnesses who have not previously testified, filed.
482	Oct 19	Defts pretrial statement re: damages, filed.
483	Oct 23	Defts' reply brief in support of motion for summary judgment and preclusion of proof, filed.
484	Nov 9	Plff's supplemental answers to interrogatories of Kennedy Culvert, first set, filed.
--	Nov 9	Plff's pre-trial statement-supplement 11-9-81, filed.
--	Nov 9	Plff's amended proposed statement of the case, filed.
485	Nov 12	Plff's trial brief, filed.
486	Nov 13	ORDER THAT PLFFS MAY AMEND THE DAMAGE COMPUTATION FILED 9-14-81 WITHOUT CHANGING THE THEORY OR METHODOLOGY, BY 9-21-81, ETC. PLFFS MOTION FOR PROTECTIVE ORDER FILED 9-14-81, IS GRANTED EXCEPT THAT: COURT RESERVES WHETHER DEFTS MAY DEPOSE HOWMET CORP., DEFTS SHALL SPECIFY THE PROPOSED DISCOVERY BY 9-28 & PLFFS SHALL RESPOND BY 10-5-81 EACH PARTY SHALL SUBMIT AN OFFER OF PROOF BY 10-19-81 AND THE

Date		Proceedings
1981		
		PARTIES MAY TAKE TELEPHONE DEPOSITIONS OF THESE WITNESSES PRIOR TO TRIAL: FINAL PRE-TRIAL CONFERENCE SAHLL BE HELD ON 11-12-81, ETC. TRIAL SHALL START 11-16-81, FILED. 11-13-81 Entered and Copies mailed.
487	Nov 13	Plff's Points for charge-damages, filed.
488	Nov 16	Jury Trial, jurors selected and sworn, filed.
489	Nov 18	Jury Trial, resumes, witnesses sworn, filed.
490	Nov 20	Jury Trial of 11-18-81, resumes, witnesses sworn, filed.
491	Nov 20	Jury Trial of 11-19-81, resumes, witnesses sworn, filed.
492	Nov 23	Jury Trial of 11-20-81, resumes, witnesses sworn, filed.
493	Nov 24	ORDER THAT PLFF'S MOTION FOR RECONSIDERATION OF THIS COURT'S ORDER OF 6-18-81 GRANTING A RETRIAL AS TO DAMAGES ONLY IS DENIED. PLFF'S MOTION FOR A PROTECTIVE ORDER IS DENIES AS MOOT. PLFF'S MOTION TO ADD ONE WITNESS TO PLFF'S WITNESS LIST IS GRANTED. DEFT'S MOTION FOR SUMMARY JUDGMENT AND FOR PRECLUSION OF PROOF OF DAMAGES IS DENIED. ETC. FILED. 11-24-81 Entered and Copies mailed.
494	Nov 25	Jury trial 11/23/81 resumes, witnesses sworn, filed.
495	Nov 30	Jury Trial of 11-24-81 resumes, witnesses sworn, filed.
496	Nov 30	Transcript of testimony of 11-17-81, filed.
497	Nov 30	Transcript of testimony of 11-18-81, filed.

	Date	Proceedings
	1981	
498	Nov 30	Transcript of testimony of 11-19-81, filed.
499	Nov 30	Transcript of testimony of 11-20-81, filed.
500	Nov 30	Transcript of testimony of 11-23-81, filed.
501	Nov 30	Transcript of testimony of 11-24-81, filed.
502	Dec. 1	Plff's memorandum of law, filed.
503	Dec. 1	Kaiser's memorandum regarding proposed rebuttal testimony by Dr. Spero, filed.
504	Dec. 2	ORDER THAT COFFEE BE FURNISHED 8 JURORS ENGAGED IN THE ABOVE ENTITLE CASE, FILED.
505	Dec. 2	ORDER THAT THE UNITED STATE MARSHAL BE AND HE IS HEREBY DIRECTED TO FURNISH LUNCH FOR 8 JURORS AND 1 DEPUTY UNITED STATES MARSHAL ENGAGED IN THE ABOVE ENTITLED CASE, FILED.
506	Dec. 2	Civil Jury Trial of 11-25-81 resumes, witnesses sworn, filed.
507	Dec. 2	Civil Jury Trial of 11-30-81 resumes, witnesses sworn, filed.
508	Dec. 2	Civil Jury Trial of 12-1-81 resumes, filed.
509	Dec. 2	Deposition of Lurier J. Fotrier, Jr., filed.
510	Dec. 2	Transcript of Hearing of 12-29-80, filed.
511	Dec. 2	Transcript of Hearing of 11-30-81, filed.
512	Dec. 2	Transcript of Hearing of 11-25-81, filed.
513	Dec. 2	Transcript of Hearing of 11-25-81, filed.
514	Dec. 2	Civil Jury Trial of 12-2-81, resumes, Verdict recorded, Judgment to be entered. filed.
515	Dec. 2	Interrogatories to the Jury, filed.
516	Dec. 2	ORDER POST-TRIAL MOTIONS, ARE TO BE SERVED AND FILED WITHIN 10 DAYS, ETC. ORAL ARGUMENT WILL BE HELD ON 1-29-82 AT 9:00 A.M., ETC. FILED.
		12-3-81 Entered and Copies mailed.

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	1981	
517	Dec. 2	ORDER THAT COFFEE BE FURNISHED 8 JURORS ENGAGED IN THE ABOVE ENTITLED CASE, FILED.
518	Dec. 4	ORDER THAT JUDGMENT BE AND THE SAME IS HEREBY ENTERED IN FAVOR OF JOSEPH A. BONJORNO, GEORGE M. KERR, JR. & BARBARA K. CLISBY, AS TRANSFERREES IN LIQUIDATION AND DISSOLUTION OF COLUMBIA METAL CULVERT CO., INC. AND AGAINST KAISER ALUMINUM AND CHEM. CORP. & KAISER ALUMINUM & CHEM. SALES, INC. IN THE SUM OF $9,567,939.00 FILED.
		12-4-81 Entered and Copies mailed.
519	Dec. 10	Plff's pre-trial Statement-Supplement 11-9-81, filed.
520	Dec. 10	Plff's amended proposed statement of the case, filed.
521	Dec. 14	Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc. MOTION FOR JUDGMENT N.O.V. CERTIFICATE. FILED.
522	Dec. 14	KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC. MOTION FOR A NEW TRIAL, CERTIFICATE. FILED.
523	Dec. 14	DEFT'S MOTION TO STAY EXECUTION OF THE JUDGMENT, MEMO, CERTIFICATE. FILED.
524	Dec. 28	ORDER THAT KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC. SHALL HAVE AN EXTENSION OF TIME

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1981		
		TO SERVE AND FILE A MEMORANDUM OF LAW IN SUPPORT OF THEIR POST-TRIAL MOTION UNTIL DECEMBER 31, 1981, FILED.
		12-28-81 Entered and Copies mailed.
525	Dec. 31	Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. Brief in Suppor of Motion for Judgment N.O.V. and For a New Trial, filed.
526	Dec. 31	PLFFS MOTION FOR ATTORNEY'S FEES AND COSTS, BRIEF, FILED.
1982		
527	Jan. 5	Defts brief in Support of Motions for Judgment N.O.V. or for a New Trial Errata Sheet, filed.
528	Jan. 8	Plffs' Brief in Opposition to Defts Motions for Judgment N.O.V. for a New Trial-Damages Trial, certificate, filed.
529	Jan. 29	Transcript of Jury Trial of December 1, 1981, filed.
530	Jan. 29	Transcript of Jury Trial of December 2, 1981, filed.
531	Feb. 3	ORDER THAT COUNSEL FOR PLFFS SHALL FILE, ON OR BEFORE 2-26-82 SUPPLEMENTAL DOCUMENTS SUPPORTING THE MOTION FOR ATTORNEY'S FEES AND COSTS FILED 12-31-81: ETC. FILED.
		2-3-82 Entered and Copies mailed.
532	Feb. 25	PLFF'S REVISED MOTION FOR ATTORNEY'S FEES AND COSTS, CERTIFICATE, NOTICE, BRIEF, FILED.
533	Mar. 15	PLFF'S MOTION FOR POSTING OF SECURITY TO STAY EXECUTION OF

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1982		
		JUDGMENT, NOTICE, MEMO, CERTIFICATE, FILED.
534	Mar. 19	Defts' Kaiser's answer to motion for posting of security to stay execution of judgment, memo. of law, in support of motion to stay execution, filed.
535	Mar. 29	Defts' Memorandum in Opposition to Plffs' Revised Motion for Attorney's Fees and Costs, Certificate of Service, filed.
536	Mar. 29	Richard P. McElroy's Affidavit in Opposition to Plffs' Application for Award of Attorney's Fees, filed.
537	Apr. 8	Letter to the Honorable Norma L. Shapiro from Michael M. Baylson, Esq. re: Necessity for an Evidentiary Hearing, filed.
538	June 9	ORDER THAT ON OR BEFORE JUNE 19, 1982 THE PARTIES MAY FILE BRIEFS DISCUSSING RELEVANT DEVELOPMENTS IN THE LAW SINCE THE LAST ORAL ARGUMENT. ORAL ARGUMENT ON THESE BRIEFS WILL BE HELD ON JUNE 24, 1982, ETC. FILED.
		6/9/82 Entered and Copies mailed.
539	June 18	Defts' Supplemental Memorandum in Support of Motion for Judgment N.O.V. and for A New Trial, Certificate of Service, filed.
540	June 21	Plff's Supplemental Memo. in Opposition to Defts' Post-Trial Motions, filed.
541	June 24	Argued Sur: Hearing of 6/24/82 on Supplemental Post-Trial Memoranda, filed.
542	Dec. 10	PLFF'S. MOTION TO DISPOSE DEFT'S. POST-TRIAL MOTIONS WITHOUT FULL OPINION, MEMO, CERTIFICATE, NOTICE, FILED.

Date		Proceedings
1983		
543	Jan. 17	MEMORANDUM AND ORDER GRANTING DEFT'S MOTION FOR JUDGMENT N.O.V. WITH RESPECT TO JURY AWARD OF $1,638,793.00 IN RESPONSE TO INTERROGATORY #4 AND OTHERWISE DENIED. ALTERNATIVE MOTION FOR NEW TRIAL IS DENIED; JUDGMENT WILL BE ENTERED ON VERDICT OF JURY FOR $4,651,560.00, FILED. 1/18/82 Entered & Copies mailed.
544	Jan. 18	ORDER THAT PLFFS. RECOVER OF KASIER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC. THE AMOUNT OF $4,651,560.00 WITH INTEREST AND COSTS, FILED. 1/18/83 Entered & Copies mailed.
545-46	Jan. 18	Transcripts of testimony, filed (2 vols.).
547	Jan. 19	Plff's notice of appeal, filed. (83-1079) 1/20/83 copies to: U.S.C.A., Morris L. Weisberg, Esq.
548	Jan. 19	Copy of Clerk's notice to U.S.C.A., filed.
549	Jan. 24	Certified copy of order U.S.C.A. that petition for writ of mandamus is denied, filed.
550	Jan. 27	Deft's notice of appeal, filed. 1/28/83 copies to: U.S.C.A., Michael M. Baylson, Esq.
551	Jan. 27	Copy of Clerk's notice to U.S.C.A., filed.
552	Jan. 27	DEFT'S MOTION REQUESTING A BOND FOR COSTS ON APPEAL, MEMO, CERTIFICATE, FILED.
553	Jan. 27	DEFT'S MOTION FOR APPROVAL OF SUPERSEDEAS BOND, CERTIFICATE, FILED.

Date		Proceedings
1983		
(553)	Jan. 31	ORDER DATED 1-28-83 THAT EXECUTION TO ENFORCE JUDGMENT OF 1-18-83 BE STAYED; SUPERSEDEAS BOND IN THE AMOUNT OF $4,651,560.00 IS APPROVED, FILED. 2/1/83 Entered & Copies mailed.
--	Jan. 31	Supersedeas bond in the sum of $4,651,560.00 with Insurance Co. of North America as surety, filed. 2/1/83 Entered & Copies mailed.
554	FEB. 3	Copy of Transcript Purchase Order, filed.
--	FEB. 3	RECORD COMPLETE FOR PURPOSES OF APPEAL.
555	FEB. 3	Copy of Appellant's transcript purchase order, filed.
556	FEB. 17	Plff's response to motions concerning bond on appeal, filed.
557	FEB. 18	Certificate of Service by Michael M. Baylson re: served copy of plff's response to motions concerning bond on appeal to Richard P. McElroy, Esq. on 2-17-83, filed.
558	Mar. 15	Receipts re: return of exhibits 2001, filed.
559	Mar. 15	Plff's supplemental points for charges as to damages, filed.
560	Mar. 16	MEMORANDUM & ORDER THAT PLFFS. SHALL FILE A BOND OR OTHER SECURITY IN THE AMOUNT OF $2,500.00 WITHIN 30 DAYS; DEFTS. SHALL INCREASE THE SUPERSEDEAS BOND PREVIOUSLY APPROVED BY THE COURT IN THE AMOUNT OF $2,500.00 WITHIN 30 DAYS, FILED. 3/17/83 Entered & Copies mailed.
561	Mar. 25	Transcripts of telephone conference 1-28-83, filed.

Date		Proceedings
1983		
562	Mar. 28	PLFF'S MOTION FOR RECONSIDERATION OF ORDER DATED 3-16-83, MEMO, CERTIFICATE, FILED.
563	Apr. 18	Receipt re: return of exhibits D-1325-D1387 (Vol. 12), filed.
564	Apr. 19	ORDER THAT THE COURT'S ORDER OF 3-16-83 IS STAYED PENDING DECISION ON PLFF'S MOTION FOR RECONSIDERATION, FILED. 4/20/83 Entered & Copies mailed.
565	Apr. 22	Letter dated 4-22-83 by Alexander D. Bono re: return of Exhibits D-1325 - 1387, volume 12, filed.
566	Apr. 28	ORDER THAT PLFFS' MOTION FOR RECONSIDERATION IS DENIED, FILED 4/28/83 entered & copies mailed
--	May 6	Plff's bond for costs on appeal in the sum of $250,000.00 with the Fidelity and Deposit Co. of Maryland, as surety, filed.
567.	May 12	MOTION OF DEFTS, KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC., FOR RELEASE OF SUPERSEADEAS BOND APPROVED BY ORDER ENTERED 3/17/83; & ORDER DD. 5/12/83 INSTRUCTING THE CLERK OF THE DISTRICT COURT TO RELEASE TO R. P. McELROY, ESQ. OR A. D. BONO, ESQ. (DEFTS' COUNSEL) THE SUPERSEDEAS BOND IN THE AMOUNT OF $4,651,560.00, WHICH IS FOUND IN THE RECORD AT DOCKET NO. 553, ETC., FILED. (5/13/83 entered & copies mailed.) (NS)

Date		Proceedings
1983		
-	May 12	BOND RETURNED TO DEFTS' COUNSEL on 5/12/83.
--	May 12	Deft Supersedeas Bond in the sum of $4,654,060.00, with Insurance Company of North America as surety, filed. 5/13/83 entered & copies mailed. (NS)
568	July 5	PLFF'S SUPPLEMENTAL MOTION FOR ATTYS. FEES AND COSTS AND FOR RELATED DISCOVERY, MEMO, CERTIFICATE, FILED.
569	July 11	Deft's memorandum in opposition to plff's supplemental motion for atty's. fees and costs and for related discovery, filed.
1985		
570	Jan. 16	PLFFS' MOTION FOR ORDER INCREASING BOND, MEMO, CERT OF SERVICE, FILED.
571	Jan. 17	PLFFS' AMENDED MOTION FOR ORDER INCREASING BOND, MEMO, CERT OF SERVICE, FILED.
572	Feb. 1	Defts' response opposing amended motion for order increasing bond, memo, cert of service, filed.
573	Feb. 1	Plffs' reply brief in support of amended motion for order increasing bond, filed.
574	Feb. 20	MEMORANDUM & ORDER THAT PLFFS' MOTION TO INCREASE THE AMOUNT OF A SUPERSEDEAS BOND IS DENIED, FILED. 2-20-85 Entered & copies mailed.
1986		
575	JUL 02	Certified copy of Judgment (USCA) that the order of said District Court ente ed 1/18/83

Date		Proceedings
1986		
		which granted in party the deft's Motion for a judgment n.o.v. is granted. It is further ordered that judgment of said District Court entered 1/18/83 is vacated & the cause remanded to said District Court which is directed to reinstate the judgment entered 12/4/81 which is affirmed. Costs taxed in favor of appellants & crossappellees, briefs & appendix $3,120.00, filed.
576	JUL 03	PLFF'S MOTION FOR AWARD OF INTEREST, MEMO, CERT OF SERVICE, FILED.
577	JUL 07	ORDER THAT CONF. SCHEDULED FOR 8/6/86, 9:30AM, J. SHAPIRO'S CHAMBERS, FILED. 7/8/86 entered & copies mailed.
578	AUG 07	ORDER THAT PLFFS SHALL SUBMIT ANY FACTUAL MATERIALS AND/OR BRIEF ON ISSUE OF INTEREST BY 10/15/86. DEFTS RESPONSE WITHIN 30 DAYS & PLFFS REPLY BRIEF WITHIN 10 DAYS THEREAFTER, WHETHER A HEARING WILL BE HELD IS RESERVED, FILED. 8/7/86 entered & copies mailed.
579	AUG 07	ORDER THAT THE PARTIES SHALL REPORT ON STATUS OF FEE SETTLEMENT NEGOTIATIONS BY 9/30/86, IF FEE ISSUE HAS NOT BEE SETTLED, BRIEFS DUE, PLFFS 10/31/86, DEFTS 11/28/86, EVIDENTIARY HEARING & ORAL ARGUMENT 12/23/86, 9:30AM, CTRM 10-A, FILED. 8/7/86 entered & copies mailed.
580	SEP 16	Transcript of 8/6/86, filed.

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1986		
581	OCT 10	ORDER THAT COUNSEL SHALL ATTEND A SETTLEMENT CONFERENCE ON 11/12/86, ETC., FILED. 10/10/86 entered & copies mailed
582	OCT 10	STIPULATION AND ORDER THAT PLFFS MAY HAVE AN EXTENSION OF ONE WEEK TO 10/22/86 TO SUBMIT THEIR PAPERS ON ALL ISSUES OF POSTJUDGMENT INTEREST AND THAT DEFTS' BRIEF SHALL BE DUE 30 DAYS THEREAFTER, FILED. 10/14/86 entered and copies mailed.
583	OCT 20	Letter to Clerk from Richard P. McElroy, Esq. dtd 10/17/86 re: Morris L. Weisberg, Esq. has been withdrawn as counsl & Richard P. McElroy, Esq. appointed counsel, for deft., filed.
584	OCT 29	Plffs' Brief in Support of their Claim for Interest on Judgment under 28 USC §1961, cert of service, filed.
585	NOV 12	Defts' Objections to Plffs' Post Judgment Interrogatories & Request for Production of Documents, cert of service, filed.
586	NOV 19	STIPULATION & ORDER EXTENDING TIME UNTIL 12/17/86 IN WHICH DEFT. KAISER ALUMINUM & CHEMICAL CORP. HAS TO FILE ITS BRIEF ON THE ISSUE OF POST JUDGMENT INTEREST, FILED. 11/20/86 entered & copies mailed.
587	NOV 21	ORDER THAT A HEARING ON THE ISSUE OF POST JUDGMENT INTEREST WILL BE HELD ON 12/23/86, ETC. A HEARING ON THE ISSUE OF COUNSEL FEES WILL BE HELD BEGINNING

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1986		
		2/9/ ETC. FILED.
		11/21/86 Entered and Copies mailed.
588	NOV 26	Plff's Brief in Support of Application for Atty's Fee, cert of service, filed.
589	DEC 03	Defts Brief in Opposition to Plffs' Claim for interest on the judgment under 28 USC §1961, cert of service, filed.
590	DEC 08	Defts Robert A. Kennedy & Kennedy Culvert & Supply Co.'s Dissolution of Attachment, filed.
591	DEC 08	Defts Robert A. Kennedy & Kennedy Culvert & Supply Co.'s Praecipe to Mark Judgment Satisfied of the judgment of 12/26/79 for costs in favor of defts & against plff Columbia Metal Culvert Co., Inc., filed.
592	DEC 18	Plff's Reply Brief in Support of their Claim for Interest, cert of service, filed.
593	DEC 24	ORDER THAT EVIDENTIARY HEARING ON AWARD OF POST JUDGMENT INTEREST SCHEDULED FOR 1/7/87, 4:00PM, FILED.
		12/26/86 entered & copies mailed.
1987		
594	JAN 06	Defts' Submission in Opposition to Application of the United States Rule, cert of service, filed.
595	JAN 9	Hearing 1/7/87 re: award interest, witness sworn, filed.
596	JAN 09	STIPULATION & ORDER EXTENDING TIME UNTIL 1/20/87 IN WHICH DEFT HAS TO FILE BRIEF IN OPPOSITION TO PLFFS APPLICATION FOR ATTYS FEES, FILED.
		1/12/87 entered & copies mailed.

Date		Proceedings
1987		
597	JAN 12	Transcript of 12/23/86, filed. (ER)
598	JAN 20	PLFFS MOTION TO DEFER RULING ON PLFFS RIGHT TO ALLOCATE FUNDS RECD BETWEEN PRINCIPAL & INCOME, CERT OF SERVICE, FILED.
599	JAN 23	Transcript of 1/7/87, filed.
600	JAN 28	Defts' Preliminary Brief in Opposition to Plffs Application for Atty's Fee, cert of service, filed.
601	FEB 05	ORDER THAT BRIEFS SHALL BE FILED AS FOLLOWS: PLFFS' 11/26/86; DEFTS' PRELIMINARY, 1/28/87; DEFTS' FINAL, 2/16/87; PLFFS' REPLY, 3/2/87, ETC., FILED.
		2/6/87: Entered and copies mailed.
602	FEB 17	Defts' brief in opposition to Plffs' application for attorneys fees, certificate, filed.
603	FEB 17	Appendix to Defts' memo in opposition to plffs' application for the award of Attorneys' fees, filed.
604	MAR 9	PLFF'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES, CERTIFICATION OF COUNSEL, CERTIFICATE OF SERVICE, BRIEF, FILED.
605	MAR 9	Reply brief of plff & Duane, Morris & Heckscher in support of application for attorney's fee, certificate of service, affidavits, filed.
606	MAR 23	Deft's brief in opposition to motion to compel, cert. of service, filed.
607	MAY 04	STIPULATION & ORDER THAT FOR THE PURPOSES OF RELEASING THE SUPERCEDEAS BOND CURRENTLY MAINTAINED BY DEFTS KAISER ALUMINUM & CHEMICAL CORP. & KAISER ALUMINUM & CHEMICAL SALES, INC.

Date		Proceedings
1987		
		ALL PARTIES AGREE THAT A BOND IS NO LONGER REQUIRED AS PRINCIPAL JUDGMENT HAS BEEN PAID. THIS STIPULATION IS ENTERED INTO WITHOUT PREJUDICE TO PLFFS' CLAIM FOR INTEREST & ATTYS FEES, FILED.
		5/5/87 entered & copies mailed.
608	AUG 13	Plffs' Supplemental Brief in Support of Attys' Fees & Costs, cert of service, filed.
609	AUG 13	Affidavit of Regan R. Rockhill, cert of service, filed.
610	OCT 01	Defts' Supplemental Brief re: Impropriety of a Contingency Enhancement to Award of Atts Fees, cert of service, filed.
1988		
611	FEB 29	ORDER THAT A CONFERENCE IS SCHEDULED FOR 4/11/88, 4:30PM, FILED.
		3/1/88 entered & copies mailed.
612	APR 11	ORDER THAT PLFFS MOTION TO COMPEL ANSWERS TO INTERR. 3 & 6, FIRST SET & DEFTS ANSWER IN OPPOSITION, MOTION – DENIED, ETC., FILED.
		4/12/88 entered & copies mailed.
613	APR 12	MEMORANDUM & ORDER THAT PLFFS MOTION TO AWARD POST-JUDGMENT INTEREST – GRANTED, DEFTS SHALL PAY PLFFS POST-JUDGMENT INTEREST IN AMOUNT OF $2,632,886.30 CALCULATED AS FOLLOWS: INTEREST PERIOD (12/2/81 TO 7/3/86) = 4 yrs, 214 DAYS

Date		Proceedings
1988		
		INTEREST OWED = ($9,567,939) x (6%) x (4 + (214/365)) = $2,632,886.30, FILED.
		4/12/88 entered & copies mailed.
614	APR 13	Plff's Notice of Appeal, filed. (USCA 88-1318)
		4/14/88 copies to F. Poul, R. McElroy, J. Shapiro, D. Spitz, Clerk, USCA.
615	APR 13	Copy of Clerk's Notice, filed.
616	APR 20	ORDER THAT A HEARING IS SCHEDULED FOR 6/1, 6/2 & 6/3/88, 10:AM, CTRM 10-A, FILED.
		4/21/88 entered & copies mailed.
617	APR 29	Appellant's TPO form, filed.
--	MAY 3	RECORD COMPLETE FOR PURPOSES OF APPEAL-TRANSCRIPT ALREADY ON FILE.
618	MAY 11	Kaiser Aluminum & Chemical Corp. & Kaiser Aluminum & Chemical Sales, Inc's cross notice of appeal, filed. (USCA 88-1396)
		5-12-88 Entered & copies to: USCA, D. Spitz, Judge Shapiro, M. Baylson, F. Poul.
619	MAY 11	Copy of Clerk's Notice, filed.
620	MAY 16	ORDER THAT ORAL ARGUMENT SCHEDULED FOR 6/1/88 IS CANCELLED, FILED.
		5/16/88 entered & copies mailed.
621	MAY 16	MOTION OF DEFTS TO STAY EXECUTION ON 4/11/88 ORDER FIXING THE AMOUNT OF POST JUSGMENT INTEREST, MEMO, CERT OF SERVICE, FILED.
622	MAY 18	Memorandum of Plffs in Opposition to Defts Motion for Stay of Execution of Interest Award, cert of service, filed.

Date		Proceedings
1988		
623	MAY 19	Reply Memorandum of defts in support of Motion to Stay Execution on 4/11/88 Order Fixing amount of post judgment interest, cert of service, filed.
(621)	MAY 20	ORDER THAT DEFTS MOTION – GRANTED, EXECUTION IS STAYED WITHOUT BOND, FILED. 5/20/88 entered & copies mailed.
624	MAY 24	Appellant's TPO form, filed.
625	JUN 24	ORDER THAT THE HEARING ON THIS CASE SCHEDULED FOR 7/5/88, 7/6/88 AND 7/7/88 IS CANCELLED, FILED. 6/27/88 entered & copies mailed.
626	OCT 13	Letter recd from Elizabeth A. Welch for receipt of plff's exhibits, filed.
627	OCT 13	Order that in accordance with LR 39 of this court, the following exhibits have been deemed abandoned & destroyed, deft's exhibits, filed.
1989		
628	MAR 21	ORDER THAT ON DISPOSITION OF THE PETITION FOR REHEARING PLFFS MAY SUPPLEMENT THE FEE PETITION WITH ANY CLAIM FOR ATTORNEY'S FEES ON APPEAL WITHIN 60 DAYS: ETC: DEFTS MAY RESPOND WITH REGARD TO ITEMS CONTESTED AS TO NATURE OR AMOUNT (TIME EXPENDED OR RATE CHARGED): AN EVIDENTIARY HEARING WILL BE HELD BEGINNING ON JUNE 19, 1989 at 9:00AM, FILED. 3/21/89 entered & copies mailed.
629	MAY 18	PLFFS' MOTION FOR SUBSTITUTION

Date		Proceedings
1989		
		OF PARTY BY REASON OF DEATH, MEMO, CERTIFICATE, FILED.
630	MAY 19	Affidavit of Edward G. Biester, III regarding supplemental request for fees and costs through April 30, 1989, filed.
631	MAY 19	Affidavit of William G. Frey regarding supplemental request for fees and costs through April 30, 1989, filed.
(629)	JUN 07	ORDER THAT LORRAINE KERR'S MOTION IS GRANTED, & THAT THIS ACTION SHALL PROCEED WITH LORRAINE KERR, EXECUTRIX OF THE WILL OF GEORGE M. KERR, JR, SUBSTITUTED AS A PARTY PLFF IN THE PLACE OF GEORGE M. KERR, JR, FILED. 6/7/89 entered & copies mailed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
DOCKET NO. 83-1047

Date	*Proceedings*
1983	
Jan. 21	Motion by applts. to expedite appeal, in which it states applts. can file B&A within 20 days from 1/21/83 (2-10-83), and propose that appees. brief be filed at 20 day intervals & oral argmt. be scheduled as promptly as possible, w/svc., filed.
Jan. 21	Motion by applts. to file a separate appdx., w/svc., filed.
Jan. 27	Memorandum by appee. Kaiser Aluminum in response to mot. to expedite appeal, w/svc., filed.
Jan. 27	Reply by appees. Kaiser Aluminum, to applts' mot. to file a sep. appdx., w/svc., filed.
Jan. 28	Submitted on applts' mot. to expedite appeal, and mot. to file sep. appdx. Coram: Gibbons, Hunter & Rosenn, C.J.
Feb. 2	Letter dated 2/1/83 from C. Charles Hodgson, Jr., Esq., adv. his client Robert Kennedy & Kennedy Culvert will be involved in this appeal and accordingly no appearance will be entered. Send to Merits Panel.
Feb. 8	Order (*Gibbons,* Hunter & Rosenn, C.J.) denying applts' mot. to expedite appeal; denying applts' mot. to file a sep. appdx., and stating Judge Hunter would grant the mot. to expedite the appeal, filed.
Mar. 21	Motion by appees-cross-applts., Kaiser Aluminum etc., et al. to file a B. in excess of 50 pgs. to 75 pgs., w/svc., filed. (Cov. 83-1047 & 83-1079)
Mar. 22	Response by applts. to mot. of appees-cross-applts., Kaiser to file B. in excess pagn., w/svc., filed. (Cov. 83-1047 & 83-1079)
Mar. 28	Order (Clerk) denying above mot. as presented; granting permission to file a brief not to exceed 60 pgs., filed. (Cov. 83-1047 & 83-1079)

Date	*Proceedings*
1983	
Apr. 15	Motion consent, for leave to file one additional volume of appendix, (Vol. 13), w/serv., filed.
Apr. 26	Order (Clerk) grant above motion, filed.
May 24	Consent Motion by aplts for enlargement of the number of pages in their second brief, w/serv, filed.
May 31	Order (Acting Clerk) denying above mot. as presented; directing cnsl may file a brief in excess of pgs. of ten (10), filed.
May 26	Ltr dated 5/25/83 from Michael M. Baylson, cnsl for applt., stating that cnsl for both sides request this matter not be listed for disposition between Aug 8-19 and Aug. 29-Sept. 9, etc. Send to merits
June 1	Mot. by applts-cross-applees for leave for leave to file one addl. vol. of appendix (Vol. 14), w/consent, w/serv., filed. (cvs. 83-1047 & 1079)
June 3	Order (Clerk) granting above mot. with filing as of the date of this order, filed. (Cvs. 83-1047 & 1079)
June 16	Mot. by applts-cross-applees to advance case on Court's calendar, w/serv., filed. (Cvs. 83-1047 & 1079)
June 16	Memorandum of applees-cross-applts in opposition to mot. to advance cases on Court's calendar, w/serv., filed. (Cvs. 83-1047 & 1079)
June 20	Order (Clerk) denying applts-cross-applees' mot. to advance cases on Court's calendar, filed. (Cvs. 83-1047 & 1079)
June 24	Ltr dated 6/24/83 from Michael M. Baylson, Esq., cnsl for applt. pursuant to Rule 28 (j), F.R.A.P., recd. for the Court's info. (Cvs. 83-1047 & 1079) Send to Merits
June 24	Ltr dated 6/24/83 from cnsl for applt. requesting that cases be listed on Wednesday, 9/14/83 or Thursday, 9/15/83. (Cvs. 83-1047 & 1079)
June 29	Ltr dated 6/29/83 from Richard P. McElroy, Esq., cnsel for applees. pursuant to Rule 28(j), F.R.A.P.,

Date	*Proceedings*
1983	
	recd. for the Court's info. (Cvs. 83-1047 & 1079) Send to Merits
Nov. 14	Ltr dtd 11/11/83 from Michael M. Baylson, Esq, cnsel for applts in 83-1047, recd for the Court's info. (Cvs. 83-1047 and 83-1079)
Nov. 17	Copy of 11th Cir's opinion in *Graphic Products Distributors, Inc. v. Itek Corp.*, recd from Michael M. Baylson, Esq., for the Court's info. (Cvs. 83-1047 & 1079)
Dec. 16	Clk's ltr to cnsel, written at the direction of the Crt, directing cnsel to reply to the question of what effect, if any, a holding that a corp. cannot conspire with its wholly-owned subsidiary would have on the issues in the case of *Copperweld Corp. v. Independence Tube Co.*, No. 82-1210, orig & 3cc's shld be recd by the Clk on or before 12/22/83. (Cvs. 83-1047 & 1079)
Dec. 22	Ltr dtd 12/22/83 from Richard P. McElroy, Esq, cnsel for Kaiser Aluminum & Chemical Corp., et al., recd at the direction of the Court. (Cvs. 83-1047 & 1079)
Dec. 22	Ltr dtd 12/22/83 from Michael M. Baylson, Esq, cnsel for Joseph A. Bonjorno, et al., w/encl., appendix to ltr, recd at the direction of the Crt. (Cvs. 83-1047 & 1079)
Dec. 28	Clerk's letter to counsel, written at the direction of the Ct., advising the Court has decided to await the S.C. opinion in *Copperweld Corp. v. Independence Tube Co.* (Cvs. 83-1047 & 83-1079)
1984	
June 21	Ltr. dtd 6/21/84 from Richard P. McElroy, Esq, cnsel for Kaiser Aluminum & Chemical Corp., et al., w/encl., recd for the Crt's info. (Cvs. 83-1047 & 1079)
June 21	Ltr dtd 6/21/84 from Michael M. Baylson, Esq,

Date	*Proceedings*
1984	
	requesting the opportunity to submit a ltr to the Crt giving addl reasons why the *Copperweld* decision does not effect the present case *and* to submit reasons why *Copperweld* shld be held not retroactive to this case, *and* for permission to submit these ltrs by 6/29/84. (Cvs. 83-1047 and 84-1079)
June 25	Clk's ltr to cnsel, written at the direction of the Crt, requesting cnsel to comment by ltr on the effect of the S.C. decision in *Copperweld Corp. v. Independence Tube Corp.*, decided 6/19/84, 52 Law Week 4821, on the issues presented in the above matter; orig & 3cc's of ltrs shld be recd by Clk's ofc on or before 7/10/84. (Cvs. 83-1047 & 1079)
July 10	Ltr dtd 7/10/84 from Richard P. McElroy, Esq, cnsel for Kaiser Aluminum & Chemical Corp., et al., recd at the direction of the Crt. (Cvs. 83-1047 & 1079)
July 10	Ltr dtd 7/10/84 from Michael Baylson, Esq, cnsel for Bonjorno, et al., recd at the direction of the Crt. (Cvs. 83-1047 & 1079)
July 12	Ltr dtd 7/12/84 from Henry T. Reath, Esq, cnsel for Bonjorno, et al., correcting and supplementing a matter contained in his ltr of 7/10/84. (Cvs. 83-1047 & 1079)
Oct. 1	Ltr dtd 10/1/84 from Michael Baylson, Esq, cnsel for Joseph A. Bonjorno, et al., w/encl., pur. to Rule 28(j), F.R.A.P., recd for the Crt's info. (Cvs. 83-1047 & 1079)
Nov. 6	Ltr dtd 11/6/84 from Richard P. McElroy, Esq, cnsel for applees, Kaiser Aluminum & Chemical Corp., et al., w/encls., recd for the Crt's info. (Cvs 83-1047 & 1079)
Nov. 8	Ltr dtd 11/7/84 from Michael M. Baylson, Esq, cnsel for Bonjorno, et al., pur. to Rule 28(j), F.R.A.P., recd for the Crt's info. (Cv. 83-1047 & 1079) (dt)

Date	Proceedings
1985	
Jan. 3	Motion of Appellees, Cross-Appellants, Kaiser Aluminum & Chemical, et al, for a thirty day extension of time within which to file pet. for rehg, filed. w/serv. (ch) Covers 83-1047 and 83-1079
Jan. 10	Order (Seitz, C.J.) granting mot. of appee/crs. aplts, for a thirty day ext. of time in which to file pet. for rehg. to and including Feb. 11, 1985, filed. (ml) (Cvs. 83-1047 & 83-1079)
1984	
Dec. 27	The order of the D.C. entered 1-18-83 which granted in part defendant's motion for a judgment n.o.v. is reversed. The judgment of the D.C. is vacated and the cause remanded to D.C. which is directed to reinstate the judgment entered 12-4-81, which is affirmed. Costs taxed in favor of appellants and cross-appellees. All the above in accordance with the opinion of this Court, filed. (ml) (Cvs. 83-1047 & 83-1079)
1985	
Jan. 17	Motion of Appellees, Cross-appellants, Kaiser Aluminum, et al., for leave to increase the maximum number of pages in their pet. for rehg. to 30 pps. filed. (Cvs. 83-1047 & 83-1079) (ml)
Jan. 22	Order (Seitz, C.J.) granting apees, crs-aplts leave to increase max. number of pages in pet. for rehg. to thirty pages, filed. (ml) (Cvs. 83-1047 & 83-1079)
Feb. 14	Motion of appellant for leave to file bill of costs out of time, w/serv., filed. (ml) (Cvs. 83-1047 & 83-1079)
Feb. 26	Order (Clerk) granting appellant's motion for leave to file bill of costs out of time, filed. (ml) (Cvs. 83-1047 & 83-1079)
March 8	Order (Aldisert, Ch.J., *Seitz*, Adams, Gibbons, Hunter, Weis, Garth, Higginbotham, Sloviter, Becker & Rosenn, C.Js.) denying the petition for

Date	Proceedings
1985	
	rehearing in banc. Judge Becker would grant rehearing limited to the price-squeeze issue, together with separate statement sur denial of petition for rehearing by Judge Adams. (Cvs. 83-1047 & 83-1079) (ml)
March 13	Motion of apee/crs-aplt., Kaiser Aluminum, et al. for an order staying issuance of mandate, w/serv., filed. (Cvs. 83-1047 & 83-1079) (ml)
March 15	Response of appellants/cross-apees. Bonjorno, et al. to apees/crs.aplts. motion for an order staying issuance of mandate, filed. (Cvs. 83-1047 & 83-1079) (ml)
March 27	Order (Seitz, C.J.) staying issuance of mandate to and including June 6, 1985, filed. (Cvs. 83-1047 & 83-1079) (ml)
April 1	Motion of appellants/cross-appellees, Bonjorno, et al., for posting of security by appellees/ cross-appellants, Kaiser Aluminum & Chemical Corporation, et al., w/serv., filed. (Cvs. 83-1047 & 83-1079) (ml)
April 8	Response of appees/crs.aplts. Kaiser Aluminum, et al. in opposition to motion of aplts/crs.apees for posting security, filed. (Cvs. 83-1047 & 83-1079) (ml)
April 12	Clerk's letter to counsel written at the direction of the Court requesting counsel to comment on the applicability of Rule 44.2 of the Rules of the S.C. of the U.S.A., to this matter. Responses due on or before 4-17-85. (Cvs. 83-1047 & 1079) (ml)
April 17	Letter dated 4-17-85, from Joseph A. Fillip, Jr., Esq., cnsl for Bonjorno, et al., in response to Court's request of 4-12-85, filed. (83-1043 & 1079)
April 17	Letter dated 4-17-85, from Alexander D. Bono, Esq., cnsl for Kaiser, et al. in response to Court's request of 4-12-85, filed. (Cvs. 83-1047 & 1079) (ml)
April 26	Order (SEITZ, CJ) which reads as follows: "The foregoing motion and the response having been considered along with the supplemental briefing and

Date	*Proceedings*
1985	
	being of the view that I may exercise discretion and that appellees-cross appellants have shown good cause under the present circumstances for not requiring additional security, it is Ordered that the motion is denied", filed. (1043 & 1079) (ch)
1986	
June 24	~~Motion by Plaintiffs-Appellants-Cross-Appellees' pursuant to FRAP 37 for inclusion in mandate of instructions regarding interest filed (Covers 83-1047 & 83-1079) (bjr)~~ WITHDRAWN 6/30/86
June 26	Ltr. date 6/26/86 rec'd from Michael M. Baylson, Esquire.
June 30	Stipulation by the cnsl for the parties as follows: 1. The mandate shall issue to the U.S. D.C. for the Eastern Dist of Penna. immediately and shall state that the D.C. should consider all issues regarding the calculation of interest in this case. 2. Plaintiffs – Aplts – Cross-Appees withdraw, without prejudice, their Motion Pursuant to Fed. R. App. P. 37 for inclusion in Mandate of Insructions regarding Interest. 3. Defendants = Appees-Cross-Aplts. agree that they will not contend that plaintiffs have waived any procedural or substantive claim for interest by this Court not considering the issue of interest Covers. 83-1047 and 83-1079, filed. (bjr)
July 1	Order (*Seitz,* Gibbons and Rosenn, CJs) approving the above stipulation. The mandate shall issue promptly, filed. (Covs. 83-1047 & 83-1079) (bjr)
1988	
April 25	Motion of Applt's cross Aplees to recall & amend the mandate to award postjudgment interest pursuant to F.R.A.P. 37, w/serv.fld., (bj)(cvs.83-1047 & 83-1079) (bj)
April 27	Ltr dtd Apr 27, 1988, frm R.P.McElroy, Esq., rec'd,

Date	*Proceedings*
1988	
	(bj) (cvs. 83-1047/1079)
May 3	Opposition of Defendants-applts-cross-aplees to motion to recall & amend the mandate to award post judgment interest pursuant to FRAP 37, fld., (bj) (cvs. 83-1047/79)
May 5	Applts reply Memo in suupport of Motion to Recall & Amend Mandate, w/service, rec'd for the info of the Court, (bj) (cvs. 83-1047/79) (bj)
May 20	Order (Gibbons, Ch.J., *Seitz* & Rosenn, C.J.'s) denying motion to Plaintiffs-Appellant-Cross-Appellees to Recall & amend Mandate to Award Posjudgment Intrerest, without prejeduce to any direct appeal., fld. (bj) (cvs. 83-1047 & 83-1079) (bj)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
DOCKET NO. 83-1079

Date	*Proceedings*
1983	
Mar. 21	Motion by appees-cross-applts., Kaiser Aluminum etc., et al. to file a B. in excess of 50 pgs. to 75 pgs., w/svc., filed. (Cov. 83-1047 & 83-1079)
Mar. 28	Order (Clerk) denying above mot. as presented; granting permission to file a brief not to exceed 60 pgs., filed. (Cov. 83-1047 & 83-1079)
Mar. 22	Response by applts. to mot. of appees-cross-applts., Kaiser to file B. in excess pagr ., w/svc., filed. (Cov. 83-1047 & 83-1079)
June 16	Mot. by applts-cross-applees to advance cases on Court's calendar, w/serv., filed. (Cvs. 83-1047 & 1079)
June 16	Memorandum of applees-cross-applts in opposition to mot. to advance cases on Court's calendar, w/serv., filed. (Cvs. 83-1047 & 1079)
June 20	Order (Clerk) denying applts-cross-applees' mot. to advance cases on Court's calendar, filed. (Cvs. 83-1047 & 1079)
June 1	Mot. by applts-cross-applees for leave to file one addl. vol. of appendix (Vol. 14), w/consent, w/serv., filed. (Cvs. 83-1047 & 1079)
June 3	Order (Clerk) granting above mot. with filing as of the date of this order, filed. (Cvs. 83-1047 & 1079)
June 24	Ltr dated 6/24/83 from Michael M. Baylson, Esq., cnsl for applt. pursuant to Rule 28(j), F.R.A.P., recd. for the Court's info. (Cvs. 83-1047 & 1079) Send to Merits
June 24	Ltr dated 6/24/83 from cnsl for applt. requesting that cases be listed on Wednesday, 9/14/83 or Thursday, 9/15/83. (Cvs. 83-1047 & 1079) Send to Merits
June 29	Ltr dated 6/29/83 from Richard P. McElroy, Esq., cnsel for applees. pursuant to Rule 28(j), F.R.A.P.,

Date	*Proceedings*
1983	
	recd. for the Court's info. (Cvs. 83-1047 & 1079) Send to Merits
Nov. 14	Ltr dtd 11/11/83 from Michael M. Baylson, Esq, cnsel for applts in 83-1047, recd for the Court's info. (Cvs. 83-1047 & 1079)
Nov. 17	Copy of 11th Cir's opinion in Graphic Products Distributors, Inc. v. Itek Corp recd from Michael M. Baylson, Esq., for the Court's info. (Cvs. 83-1047 & 83-1079)
Dec. 16	Clk's ltr to cnsel, written at the direction of the Crt, directing cnsel to reply to the question of what effect, if any, a holding that a corp. cannot conspire with its wholly-owned subsidiary whould have on the issues in the case of *Copperweld Corp. v. Independence Tube Co.*, No. 82-1210, orig & 3cc's, shld be recd by the Clk on or before 12/22/83. (Cvs. 83-1047 & 1079)
Dec. 22	Ltr dtd 12/22/83 from Richard P. McElroy, Esq, cnsel for Kaiser Aluminum & Chemical Corp., et al., recd at the direction of the Crt. (Cvs. 83-1047 & 1079)
Dec. 22	Ltr dtd 12/22/83 from Michael M. Baylson, Esq, cnsel for Joseph A. Bonjorno, et al., w/encl., appendix to ltr, recd at the direction of the Crt. (Cvs. 83-1047 & 1079)
Dec. 28	Clerk's letter to counsel, written at the direction of the Court, adv. the Ct. has decided to await the S.C. opinion in *Copperweld Corp. v. Independence Tube Co.* (Cvs. 83-1047 & 83-1079)
1984	
June 21	Ltr dtd 6/21/84 from Richard P. McElroy, Esq, cnsel for Kaiser Aluminum & Chemical Corp., et al., w/encl., recd for the Crt's info. (Cvs. 84-1047 & 79)
June 21	Ltr dtd 6/21/84 from Michael M. Baylson, Esq, requesting the opportunity to submit a ltr to the Crt giving addl reasons why the *Copperweld* decision

Date	Proceedings
1984	
	does not effect the present case *and* to submit reasons why *Copperweld* shld be held not retroactive to this case, *and* for permission to submit these ltrs by 6/29/84. (Cvs. 83-1047 and 83-1079)
June 25	Clk's ltr to cnsel, written at the direction of the Crt, requesting cnsel to comment by ltr on the effect of the S.C. decision in *Copperweld Corp. v. Independence Tube Corp.*, decided 6/19/84, 52 Law Week 4821, on the issues presented in the above matter; orig & 3cc's of ltrs shld be recd by Clk's ofc on or before 7/10/84. (Cvs. 83-1047 & 1079)
July 10	Ltr dtd 7/10/84 from Richard P. McElroy, Esq, cnsel for Kaiser Aluminum & Chemical Corp., et al., recd at the direction of the Crt. (Cvs. 83-1047 & 1079)
July 10	Ltr dtd 7/10/84 from Michael M. Baylson, Esq, cnsel for Bnonjorno, et al., recd at the direction of the Crt. (Cvs. 83-1047 & 1079)
July 12	Ltr dtd 7/12/84 from Henry T. Reath, Esq, cnsel for Bnonjorno, et al., correcting and supplementing a matter contained in his ltr of 7/10/84. (Cvs. 83-1047 & 1079)
Oct. 1	Ltr dtd 10/1/84 from Michael M. Baylson, Esq, cnsel for Joseph A. Bonjorno, et al., w/encl., pur. to Rule 28(j), F.R.A.P., recd for the Crt's info. (Cvs. 83-1047 & 1079)
Nov. 6	Ltr dtd 11/6/84 from Richard P. McElroy, Esq, cnsel for applees, Kaiser Aluminum & Chemical Corp., et al., w/encls., recd for the Crt's info. (Cvs. 83-1047 & 1079)
Nov. 8	Ltr dtd 11/7/84 from Michael M. Baylson, Esq, cnsel for Bonjorno, et al., pur. to Rule 28(j), F.R.A.P., recd for the Crt's info. (Cv. 83-1047 & 1079) (dt)
1985	
Jan. 3.	Motion of Appellees, Cross-Appelants, Kaiser Aluminum & Chemical Corp., et al, for a thirty day

Date	Proceedings
1985	
	extension of time within which to file pet. for rehg, filed. w/serv. Cvs. 83-1047 & 83-1079 (ch)
Jan. 10	Order (Seitz, C.J.) granting mot. of appe/crs. aplts, for a thirty day ext. of time in which to file pet. for rehg. to and including Feb. 11, 1985, filed. (ml) (Cvs. 83-1047 & 83-1079)
Dec. 27	JUDGMENT – The order of the D.C. entered 1-18-83 which granted in part defendants motion for ajudgment n.o.v. is reversed. The judgment of the D.C is vacated and the cause remanded to D.C. which is directed to reinstate the judgment entered 12-4-81, which is affirmed. Costs taxed in favor of appellants and cross-appellees. All the above in accordance with the opinion of this Court, filed. (ml) (Cvs. 83-1047 & 83-1079)
Jan. 17	Motion of appelleesm cross-appellants, Kaiser Aluminum, et al., for leave to increase the maximum number of pages in their pet. for rehg., to 30 pages filed. (Cvs. 83-1047 & 83-1079) (ml)
Jan. 22	Order (Seitz, C.J.) granting apees, crs-aplts leave to increase the maximum number of pages in pet. for rehg. to thirty pages, filed. (Cvs. 83-1047 & 83-1079) (ml)
Feb. 14	Motion of appellants/cross-appellees for elave to file bill of costs out of time, w/serv., filed. (Cvs. 83-1047 & 83-1079) (ml)
Feb. 26	Order (Clerk) granting appellants/crs-apees mot. for leave to file bill of costs out of time, (Cvs. 83-1047 & 83-1079) (ml)
March 8	Order (Aldisert, Ch.J., *Seitz*, Adams, Gibbons, Hunter, Weis, Garth, Higginbotham, Sloviter, Becker & Rosenn, C.Js.) denying the petition for rehearing in banc. Judge Becker would grant rehearing limited to the price-squeeze issue; together with

Date	Proceedings
1985	
	separate statement sur denial of petition for rehearing by Judge Adams. (Cvs. 83-1047 & 83-1079) (ml)
March 13	Motion of apee/crs-aplt., Kaiser Aluminum, et al. for an order staying issuance of mandate, w/serv., filed. (Cvs. 83-1047 & 83-1079) (ml)
March 15	Response of aplts./crs.-apees. Bonjorno, et al. to apees/crs.aplts. motion for an order staying issuance of mandate, filed. (Cvs. 83-1047 & 1079) (ml)
March 27	Order (Seitz, C.J.) staying issuance of the mandate to and including June 6, 1985, filed. (Cvs. 83-1047 & 83-1079) (ml)
April 1	Motion of appellants/cross-appellees, Bonjorno, et al., for posting of security by appellees/cross-appellants, Kaiser Aluminum & Chemical Corporation, et al., w/serv., filed. (Cvs. 83-1047 & 83-1079) (ml)
April 8	Response of appees/crs.aplts. Kaiser Aluminum, et al. in opposition to motion of aplts/crs.apees for posting security, filed. (Cvs. 83-1047 & 83-1079) (ml)
April 12	Clerk's letter to counsel, written at the direction of the Court requesting counsel to comment on the applicability of Rule 44.2 of the Rules of the S.C. of the U.S.A., to this matter. Responses due on or before 4-17-85. (Cvs. 83-1047 & 83-1079) (ml)
Apr. 17	Letter dated 4-17-85, from Joseph A. Fillip, Jr., Esq., cnsl for Bonjorno, et al., in response to Court's request of 4-12-85, filed. (Cvs. 83-1043, 83-1079) (ml)
Apr. 17	Letter dated 4-17-85, from Alexander D. Bono, Esq., cnsl for Kaiser, et al. in response to Court's request of 4-12-85, filed. (Cvs. 83-1047 & 1079) (ml)
Apr. 26	Order (SEITZ, CJ) which reads as follows: "the foregoing motion and the response having been considered along with the supplemental briefing and being of the view that I may exercise discretion and

Date	Proceedings
1985	
	that appellees/cross-appellants have shown good cause under the present circumstances for not requiring additional security, it is Ordered that the motion is denied", filed. (1047 & 1079) (ch)
1986	
Jun 24	~~Motion by Plaintiffs-Appellants-Cross-Appellees' pursuant to FRAP 37 for inclusion in mandate of instructions regarding interest filed. (Covers 83-1047 & 83-1079) (bjr)~~ WITHDRAWN 6/30/86.
Jun 26	Ltr. dated 6/26/86 rec'd from Michael M. Baylson, Esquire.
Jun 30	Stipulation by cnsl for the parties as follows: 1. The mandate shall issue to the U.S.D.C. for the Eastern Dist of Penna. immediately and shall state that the D.C. should consider all issues immediately and shall state that the D.C. should consider all issues regarding the calculation of interest in this case. 2. Plaintiffs-Aplts -Cross-Appees withdraw, without prejudice, their Motion Pursuant to Fed. R. App. P. 37 for inclusion in Mandate of Instructions regarding Interest. 3. Defendants-Appees-Cross-Aplts. agree that they will not contend that plaintiffs have waived any procedural or substantive claim for interest by this Court not considering the issue of interest Covers 83-1047 and 83-1079, filed. (bjr)
Jul 1	Order *(Seitz,* Gibbons and Rosenn, CJs) approving the above stipulation. The mandate shall issue promptly, filed. (Covs. 83-1047 & 83-1079) (bjr)
1988	
Apr 25	Motion of Applt's cross Aplees to recall & amend the mandate to award post interest pursuant to F.R.A.P. 37, w/serv.fld.,(bj)(cvs.83-1047 & 83-1079)
Apr 27	Ltr dtd Apr 27, 1988, frm R.P.McElroy,Esq., rec'd,

Date	*Proceedings*
1988	
	(bj)(cvs.83-1047/1079)
May 3	Opposition of def-applt-cross-apee to motion to recall & amend mandate to award postjudgment interest pursuant to FRAP 37,w/serv.fld(bj) (cvs. 83-1047/79)
May 5	Aplt rply Memo in support of Motion to Recall & amend Mandate, w/serv.,rec'd for the info of the Court, (bj)(cvs.87-1047/79)(bj)
May 20	Order(Gibbons,Ch.J.,*Seitz* & Rosenn,C.J.'s) denying motion of Plaintiffs-Appellant-Cross-Appellees to Recall & amend Mandate to Award Posjudgment Intrerest, without prejeduce to any direct appeal.,fld.(bj)(cvs.83-1047 & 83-1079)(bj)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
DOCKET No. 88-1318

Date	*Proceedings*
1988	
June 6	Mot. by aplt. for leave to exceed page limit, filed. (gt) (Cvs. 88-1318/96)
June 7	Order (Clerk) denying above mot., filed. (gt) (Cvs. 88-1318/96)
June 9	Aplt's. mot. for reconsideration of Clerk's 6-7-88 order denying leave to exceed page limit in B, filed. (gt) (Cvs. 88-1318/96)
June 13	Let. from aplt. ddt. 6-12-88, requesting to file B of 70 pages, filed. (gt) (Cvs. 88-1318/96)
June 21	Order (Gibbons) denying mot. for reconsideration of Clerk's 6-7-88 order to exceed pg. limit, filed. (gt) (Cvs. 88-1318/96)
Oct. 11	Motion by aplts-cross-apees for enlargement of time for oral argument for an add'l. 20 min. per side, filed. (adl) (Cvs 1318, 1396)
Oct. 14	Order (Stapleton, Scirica and Cowen) denying above mot., filed. (gt) (Cvs. 88-1318/96)
Oct. 14	Petition of aplts. for leave to furnish argument panel with index to various briefs, filed. (gt) (Cvs. 88-1318/96)
Oct. 12	Aplees'-cross aplts'. memorandum in opposition to mot. for enlargement of time for oral argument and correction of errata in B of aplees'-cross aplts, filed. (gt) (Cvs. 88-1318/96)
Oct. 17	Let. from aplts-cross aplees. ddt. 10-17-88, sent pursuant to 28(j)F.R.A.P., filed. (gt)(88-1318/96)
Oct. 18	Mot. of aplees-cross aplts. to strike all post-briefing submissions of aplts-cross aplees, filed. (gt) (Cvs. 88-1318/96)
Oct. 21	Petition of aplts-cross aplees. to add discrete portions of cnsl's prepared argument not covered at oral

Date	*Proceedings*
1988	
	argument due to time limitations, filed. (gt) (Cvs. 88-1318/96)
Oct. 24	Let. from aplee-cross aplts., ddt. 10-24-88, sent for the information of the Ct., rec'd. (gt) (Cvs. 88-1318/96)
Oct. 24	Memorandum of aplees-cross aplts. in opposition to pet to add discrete portions of cnsl's prepared argument not covered at oral argument due to time limitations, filed. (gt) (Cvs. 88-1318/96)
Oct. 25	Aplts' memorandun in response to Kaiser's post-briefing submissions, filed. (gt) (Cvs. 88-1318/96)
Oct. 26	Let. from aplts. ddt. 10-26-88, in response to aplees. 10-24-88 let., rec'd. (gt) (Cvs. 88-1318/96)
Oct. 26	Response of Kaiser Aluminum to aplts' submission entitled "Equitable Power of Courts to Award Market Rate Interest Above Minimum Rate Designated in Federal Interest Statute, rec'd. (gt)
Oct. 31	Order (Stapleton, Scirica and *Cowen*) denying aplts-cross aplees' 10-21-88 mot. to add discrete portions of cnsl's prepared argument not covered at oral argument, filed. (gt) (Cvs. 88-1318/96)
1989	
Jan 23	Petition For Rehearing In Banc from Kaiser Alum. w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)
Jan 20	Pet. For Inclusion Of Instructions in The Mandate Regarding Calculation of Interest from Bonjorno, w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)
Jan 27	Response of Kaiser Aluminum & ChemCorp & Kaiser Alum & Chem.Sale,Inc to Petition For Inclusion Of Instructions In The Mandate Regarding Calculation of Interest, w/serv. fld. (bj) (cvs. 88-1318 & 88-1396) (gt)
Feb. 7	Order (Stapleton, Scirica and *Cowen*) granting 10-18-88 mot. to strike, filed.
Feb. 7	Order (Stapleton, Scirica and *Cowen*) denying aplts'

Date	*Proceedings*
1989	
	petition for leave to furnish argument panel with index to the various briefs filed by plaintiff filed. (gt) (Cvs. 88-1318/96) (Cvs. 88-1318/96)
Feb 13	Order (Gibbons, Ch.J. Seitz, Higginbotham, Sloviter, Becker, Stapleton, Mansmann, Greenberg, Hutchinson, Scirica, *Cowen* & Nygaard, C.J.'s) The petitions for rehearing by aplts in 88-1318 & 88-1396 are denied. Judge Stapleton wld have granted in banc for the reasons set forth in his dissent. Judge Becker & Judge Hutchinson wld also have granted rehearing in banc., fld. (bj) (cvs. 88-1318 & 88-1396) (bj)
Feb 13	Order (Stapleton, Scirica & *Cowen*, C.J.) Denying Bonjorno's Pet. For Inclusion of Instructions in Mandate re Calculation of Interest, fld. (bj) (cvs. 88-1318/1396)
Feb 21	Motion by Kaiser, for stay of the Mandate, (90 days) to & including May 14, 1989, w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)
Feb 21	Amended Order (Stapleton, Scirica & *Cowen*, C.J.) The Court's Order filed 2-13-89 is hereby amended & supplemented as follows: The court being of the view that the issue raised should be determined by the D.C. in the first instance, the Petition For inclusion of Instructions in the Mandate is denied, fld. (bj) (cvs. 88-1318 & 88-1396)
Feb 27	Order (Stapleton, Scirica & *Cowen*, C.J.) granting Kaiser's stay of the Mandate to & including March 30, 1989, no further stay to be granted, fld. (bj) (cvs. 88-1318 & 88-1396)
Feb 28	Motion of Appellants-cross appellees For Reconsideration of Order Granting Stay of Issuance of Mandate, w/serv. fld. (bj) (cvs. 88-1318 & 1396)
Feb 28	Motion of appellant-coss appellees, Bonjorno, to Require A bond, w/serv. fld. (bj)

Date	*Proceedings*
1989	
Feb 28	Memorandum of Law of Applts-cross-appellees, Bonjorno, in support of Motion to Require A Bond And In Opposition to Kaiser's Motion to Stay Issuance of Mandate, w/serv. fld., (bj) (cvs. 88-1318 & 88-1396
Mar 2	Ltr dtd 3-2-89 frm A.B. Laupheimer, rec'd. (bj) (cvs. 88-1318 & 88-1396)
Mar 7	Response of (Kaiser) appellees/defendants/cross-appellant to Motion For Reconsideration of Order Granting Stay of Issuance of the Mandate and Motion to Require a Bond, w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)
Mar 8	Reply Memorandum Of Appellants-PLaintiffs-Cross-Appellees (Bonjorno) in Support of Motion to Require A Bond & In Opposition To Kaiser's Motion For Stay of Issuance of the Mandate, rec'd for the information of the Court, (bj) (cvs. 88-1318 & 88-1396)
Mar 20	Order (Stapleton, Scirica & *Cowen*, C.J.) The foregoing Motion by applt-cross0appellees, Bonjorno, et al for reconsideration of Order granting Stay of Issuance of Mandate is Denied. In addition, the motion of Bonjorno, et al., to require a Bond, is Denied., fld. (bj) (cvs. 88-1318 & 88-1396)
Mar 28	Motion For Substitution Of Party by Reason of Death, by Bonjorno et al., w/serv. fld. (bj) (cvs. 88-1318/ & 88-1396)
Mar 29	Order (Clerk) Upon consideration of the Motion of Lorraine Kerr to sub. her as a party as Executrix of Will of G. M. Kerr, Jr., it is hereby Ordered that said Motion is Granted, and Lorraine Kerr is substituted as a party to this action as Exec. of Will of G. M. Kerr, Jr., if there are any future proceedings in this Court, fld. (bj) (cvs. 88-1318 & 1396)
Mar 31	Ltr dtd 3-30-89 frm Laupheimer, Esq., cert. filed at

Date	*Proceedings*
1989	
	US Sup.Ct on 3-30-89, w/serv. rec'd (bj) (cvs. 88-1318/1396)
Apr 5	CC copy of certificate of evidencing docketing on March 13, 1988 at Supreme Court No. 88-1595, frm Clerk of Supreme Ct., fld. (bj) (cvs. 88-1318/96)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
DOCKET No. 88-1396

Date	*Proceedings*
1988	
June 6	Mot. by aplt. for leave to exceed page limit, filed. (gt) (Cvs. 88-1318/96)
June 7	Order (Clerk) denying above mot., filed. (gt) (Cvs. 88-1318/96)
June 9	Aplt's. mot for reconsideration of Clerk's 6-7-88 order denying leave to exceed page limit in B, filed. (gt) (Cvs. 88-1318/96)
June 13	Let. from aplt. ddt. 6-12-88, requesting to file B of 70 pages, filed. (gt) (Cvs. 88-1318/96)
June 21	Order (Gibbons, Ch.J.) denying mot. for reconsideration of Clerk's 6-7-88 order to exceed pg. limit, filed. (gt) (Cvs. 88-1318/96)
Oct. 11	Motion by aplts-cross-apees for enlargement of time for oral argument for an add'l. 20 min. per side, filed. (adl) (Cvs 1318, 1396)
Oct. 14	Order (Stapleton, Scirica and Cowen) denying above mot., filed. (gt) (Cvs. 88-1318, 1396)
Oct. 14	Petition of aplts. for leave to furnish argument panel with index to various briefs, filed. (gt) (Cvs. 88-1318, 1396)
Oct. 12	Aplees'-cross aplts. memorandum in opposition to mot. for enlargement of time for oral argument and correction of errata in B of aplees-cross aplts, filed. (gt) (Cvs. 88-1318/96)
Oct. 17	Let. from aplt. cross aplees. ddt. 10-17-88, sent pursuant to 28(j)F.R.A.P., filed. (gt)(Cvs. 88-1318/96)
Oct. 18	Mot. of aplees-cross aplts. to strike all post briefing submissions of aplts.-cross aplees. filed. (gt) (Cvs. 88-1318/96)

Date	*Proceedings*
1988	
Oct. 21	Petition of aplts-cross aplees. to add discrete portions of cnsl's. prepared argument not covered at oral argument due to time limitation, filed. (gt) (Cvs. 88-1318/96)
Oct. 24	Let. from aplee-cross aplts., ddt. 10-24-88, sent for the information of the Ct., rec'd. (gt) (Cvs. 88-1318/96)
Oct. 24	Memorandum of aplees-cross aplts. in opposition to pet to add discrete portions of cnsl's. prepared argument not covered at oral argument due to time limitations, filed. (gt) (Cvs. 88-1318/96)
Oct. 25	Aplts' memorandum in response to Kaiser's post-briefing submissions, filed. (gt) (Cvs. 88-1318/96)
Oct. 26	Let. from aplts ddt. 10-26-88, in response to aplees'. 10-24-88 let., rec'd. (gt) (Cvs. 88-1318/96)
Oct. 26	Response of Kaiser Aluminum to aplts' submission entitled "Equitable Power of Courts to Award Market Rate Interest Above Minimum Rate Designated in Federal Interest Statute, rec'd. (gt) (Cvs. 88-1318/96)
Oct. 31	Order (Stapleton, Scirica and *Cowen*) denying aplts-cross aplees' 10-21-88 mot. to add discrete portions of cnsl'd prepared argument not covered at oral argument, filed. (gt) (Cvs. 88-1318/96)
1989	
Jan 23	Petition For Rehearing In Banc from KAiser Alum, w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)
Jan 20	Petition For Inclusion Of Instructions in The Mandate Regarding Calculation of Interest, frm Bonjorno, w/serv. fld. (bj) (cvs. 88-1318-88-1396)
Jan 27	Response of Kaiser Aluminum & ChemCorp & Kaiser Alum & Chem.Sale,Inc to Petition For Inclusion Of Instructions In The Mandate Regarding Calculation of Interest, w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)

Date	*Proceedings*
1989	
Feb. 7	Order (Stapleton, Scirica and *Cowen*) granting 10-18-88 mot. to strike, filed.
Feb. 7	Order (Stapleton, Scirica and *Cowen*) denying aplts' petition for leave to furnish argument panel with index to the various briefs filed by plaintiff, filed. (gt) (Cvs. 88-1318/96) (Cvs. 88-1318/96)
Feb 13	Order (Gibbons, Ch.J. Seitz, Higginbotham, Sloviter, Becker, Stapleton, Mansmann, Greenberg, Hutchinson, Scirica, *Cowen* & Nygaard, C.J.'s) The petitions for rehearing by aplts in 88-1318 & 88-1396 are denied. Judge Stapleton wld have granted in banc for the reasons set forth in his dissent. Judge Becker & Judge Hutchinson wld also have granted rehearing in banc., fld. (bj) (cvs. 88-1318 & 88-1396) (bj)
Feb 13	Order (Stapleton, Scirica & *Cowen,* C.J.) Denying Bonjorno's Pet. For Inclusion of Instructions in Mandate re Calculation of Interest, fld. (bj) (cvs. 88-1318/1396
Feb 21	Motion by Kaiser for stay of the Mandate, (90 days) to & including May 14, 1989, w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)
Feb 21	Amended Order (Stapleton, Scirica & *Cowen,* C.J.) The Court's Order filed 2-13-89 is hereby amended and supplemented as follows: The Court being of the view that the issue raised should be determined by the D.C. in the first instance, the Petition For inclusion of Instructions in the Mandate is denied., fld. (bj) (cvs. 88-1318 & 88-1396)
Feb 27	Order (Stapleton, Scirica & *Cowen,* C.J.) granting Kaiser's Stay of the Mandate to & including March 30, 1989, *no further stay to be granted,* fld. (bj) (cvs. 88-1318 & 88-1396)

Date	*Proceedings*
1989	
Feb 28	Motion of Appellants-cross appellees For Reconsideration of Order Granting Stay of Issuance of Mandate, w/serv. fld. (bj) (cvs. 88-1318 & 1396)
Feb 28	Motion of appellant-coss appellees, Bonjorno, to Require A bond, w/serv. fld. (bj)
Feb 28	Memorandum of Law of Applts-cross-appellees, Bonjorno, in support of Motion to Require A Bond And In Opposition to Kaiser's Motion to Stay Issuance of Mandate, w/serv. fld., (bj) (cvs. 88-1318 & 88-1396)
Mar 2	Ltr dtd 3-2-89 frm A.B. Laupheimer, Esq., rec'd (bj) (cvs. 88-1318/1396)
Mar 7	Response of (Kaiser) appellees/defendants/cross-appellant to Motion For Reconsideration of Order Granting Stay of Issuance of the Mandate and Motion to Require a Bond, w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)
Mar 8	Reply Memorandum Of Appellants-PLaintiffs-Cross-Appellees (Bonjorno) in Support of Motion to Require A Bond & In Opposition To Kaiser's Motion For Stay of Issuance of the Mandate, rec'd for the information of the Court, (bj) (cvs. 88-1318 & 88-1396)
Mar 20	Order (Stapleton, Scirica & *Cowen,* C.J.) The foregoing Motion by applt-cross0appellees, Bonjorno, et al for reconsideration of Order granting Stay of Issuance of Mandate is Denied. In addition, the motion of Bonjorno, et al., to require a Bond, is Denied., fld. (bj) (cvs. 88-1318 & 88-1396)
Mar 28	Motion For Substitution of Party by Reason of Death, by Bonjorno, et al., w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)
Mar 29	Order (clerk) Uponconsideraiton of the Motion of Lorrain Kerr to substitute her as a party as Executrix of Will of G. M. Kerr, Jr., it is hereby Ordered that

Date	*Proceedings*
1989	
	said motion is granted, and Lorraine Kerr is substituted as a party to this asction as Exec. of Will of G. M. Kerr, Jr., if there are any future proceedings in this Court., fld. (bj) (cvs. 88-1318 & 1396)
Mar 31	Ltr dtd 3-30-89 Laupheimer, Esq. stating cert. filed at US Sup.Ct on 3-30-89, w/serv. rec'd, (bj) (cvs. 88-1318/1396)
Arp 5	CC copy of certificate of evidencing docketing on 3-13-89 at S.C. #88-1595, frm Clk of Sup.Ct., fld. (bj) (cvs. 88-1318 & 1395)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COLUMBIA METAL CULVERT CO., INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

INTERROGATORIES TO BE ANSWERED BY THE JURY

1. (a) Do you find from the evidence that there was a conspiracy between Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. in unreasonable restraint of trade? Yes ✓ No __

   (b) If your answer to 1(a) is yes, was the conspiracy in unreasonable restraint of trade a material and proximate cause of any injury to the business and property of plaintiff? Yes ✓ No __

2. (a) Do you find from the evidence that the relevant product market was: (CHECK ONE ONLY)

   (i) aluminum culvert and drainage pipe? ✓

   (ii) metal culvert and drainage pipe, including pipe made of steel and aluminum? _____

   (iii) culvert and drainage pipe, including pipe made of steel, aluminum and concrete? _____

(b) If you find the relevant product market was (ii) metal culvert and drainage pipe, including pipe made of steel and aluminum, or (iii) culvert and drainage pipe, including pipe made of steel, aluminum and concrete, you should not answer questions 3 or 4; you have concluded your deliberations.

3. If you find in answer to Interrogatory 2 that the relevant product market was (i) aluminum culvert and drainage pipe, do you find from the evidence:

(a) that Kaiser Aluminum & Chemical Corp. or Kaiser Aluminum & Chemical Sales, Inc. monopolized the aluminum culvert and drainage pipe market in that it had the power to control prices or exclude competition in the relevant geographic area which was willfully acquired or willfully maintained? or Yes ✓ No ___

(b) that Kaiser Aluminum & Chemical Corp. or Kaiser Aluminum & Chemical Sales, Inc. conspired with regard to aluminum culvert and drainage pipe to control prices or to exclude competitors in the relevant geographic market? or Yes ✓ No ___

(c) that Kaiser Aluminum & Chemical Corp. or Kaiser Aluminum & Chemical Sales, Inc. attempted to monopolize the aluminum culvert and drainage pipe market with the specific intent to obtain power to control prices or to exclude competitors and committed an act in furtherance of monopolization which had a dangerous probability of achieving monopolization? Yes ✓ No ___

4. If your answer to 3(a), (b), or (c) was yes, was any such defendants' monoply, conspiracy to monopolize, or attempt to monopolize as found by you a material and proximate cause of any injury to the business or property of plaintiff? Yes ✓ No ___

You have now completed your deliberations.

The Foreperson will place his/her signature on the signature line below and add the date, and the jury will return to the Courtroom.

_____

Foreperson

Date:_____

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COLUMBIA METAL CULVERT CO., INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

INTERROGATORIES TO BE ANSWERED BY THE JURY

1. In what amount, measured in dollars and cents, do you find from the evidence that Defendants caused damage to Plaintiff by reason of an increase in the usage of aluminum coil in 1971, 1972 and 1973?

   State such amount, or "None" in the following blank according to your finding. 57,000

2. In what amount, measured in dollars and cents, do you find from the evidence that Defendants caused damage to Plaintiff by profits lost for the years from June 1, 1973 through May 31, 1977?

   State such amount, or "None" in the following blank according to your finding. 1,048,000

3. In what amount, measured in dollars and cents, do you find from the evidence that Defendants caused damage to Plaintiff by reduction in the value of Columbia as a going concern as of May 31, 1977?

   State such amount, or "None" in the following blank according to your finding. 710,000

/s/
Foreperson

Dated: 8/21/79

KINDLY ADVISE THE MARSHAL WHEN YOU HAVE COMPLETED DELIBERATIONS.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COLUMBIA METAL CULVERT COMPANY, INC.	:	
VS.	:	CIVIL ACTION
KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

CIVIL JUDGMENT

BEFORE Honorable Norma L. Shapiro.

AND NOW, this 21st day of August 1979, in accordance with the Special Verdict of the Jury and the Direction of the Court,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the Plaintiff, Columbia Metal Culvert Company, Inc., and against the Defendants, Kaiser Aluminum and Chemical Corp. and Kaiser Aluminum and Chemical Sales, Inc., in the sum of FIVE MILLION, FOUR HUNDRED AND FORTY-FIVE THOUSAND ($5,445,000.00) DOLLARS.

8/22/79 entered and copies:
Michael M. Baylson
Blank, Rome, Klaus & Comisky

BY THE COURT:

ATTEST: /s/
Ellen N. Starr
DEPUTY CLERK

bcc: Robert L. Price, Esquire
Civ 1 6/72

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

MEMORANDUM and ORDER

NORMA L. SHAPIRO, J. JUNE 17th, 1981

INTRODUCTION

Post-trial motions in this antitrust litigation are before the court pursuant to a limited remand order of the United States Court of Appeals for the Third Circuit. Defendants Kaiser Aluminum & Chemical Corp. ("KACC") and Kaiser Aluminum & Chemical Sales, Inc. ("KACSI") move for a judgment notwithstanding the verdict or, in the alternative, for a new trial, following a jury verdict in favor of Columbia Metal Culvert Co., Inc. ("Columbia")[1] finding KACC and KACSI in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and awarding damages in the sum of $1,815,000. Judgment was entered for the plaintiff in the trebled amount of $5,445,000.

1. Upon liquidation of Columbia, all of its claims, rights and interest in this litigation were assigned to its shareholders, Joseph A. Bonjorno, George M. Kerr, Jr. and Barbara K. Clisby; the current named plaintiffs were substituted as parties pursuant to Fed.R.Civ.P. 25(c) by the court's Order of May 30, 1980.

Columbia originally brought suit against KACC and KACSI and former Columbia salesman Robert A. Kennedy and the company he owned, Kennedy Culvert and Supply, an independent distributor of culvert and drainage pipe manufactured by KACSI. The complaint alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and Section 3 of the Clayton Act, 15 U.S.C. §15. At the jury trial held before the Hon. Edward N. Cahn, a directed verdict for all defendants was entered at the close of Columbia's case on the ground that Columbia had not made out a *prima facie* case of conspiracy in restraint of trade between KACC/KASCI and the Kennedy defendants. The district court further found that the product market was not limited to aluminum culvert pipe as Columbia had maintained but included culvert pipe whether made from either aluminum or steel. Since the Kaiser share of the aluminum and steel culvert pipe market was concededly not significant, the court held that Kaiser could not have monopoly power. The court further found that no *prima facie* violation of Section 3 of the Clayton Act had been proven. *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum and Chemical Corp.*, Civil Action No. 74-122 (July 20, 1977).

On appeal by Columbia, the Third Circuit reversed in part and affirmed in part. The Court affirmed the grant of a directed verdict in favor of the Kennedy defendants on the issue of conspiracy. The Court also upheld the district court's finding that no *prima facie* case of a Clayton Act violation had been proven. However, the grant of a directed verdict in favor of defendants KACC and KACSI was reversed. The Court held that:

> (1) There was sufficient evidence to allow a jury reasonably to conclude that a relevant market for Sherman Act purposes was composed of aluminum culvert only rather than culvert of either aluminum or steel;
>
> (2) There was sufficent evidence to go to the jury on the charge that KACSI and KACC violated §2 of the Sherman Act by monopolizing or attempting to monopolize the aluminum culvert market; and

(3) There was sufficient evidence to go to the jury on the charge that KACC and KACSI conspired in restraint of trade in violation of §1 of the Sherman Act.

Columbia Metal Culvert Company, Inc. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20, 37 (3d Cir. 1978), *cert. denied*, 439 U.S. 876 (1978).

A bifurcated trial before this court resulted in a determination of defendants' liability in answer to special interrogatories (attached to this opinion as Appendix A); the jury found that the relevant product market was for aluminum culvert pipe, that defendants KACC and KACSI had monopolized, attempted to monopolize, and conspired to monopolize this market in violation of Section 2 of the Sherman Act; that KACC and KACSI had conspired in violation of Section 1 of the Sherman Act; and that Columbia had been injured by the unlawful acts of KACC and KACSI.

The jury then awarded damages in the amount of $1,048,000 for lost profits, $710,000 for the destruction of Columbia as a going concern, and $57,000 for the cost of extra metal (relating to Columbia's spiral machine for making pipe), a total of $1,815,000, which trebled resulted in a judgment of $5,445,000. Following a second appeal, the case was remanded to the district court for disposition of post-trial motions.[2] (Docket Entry #426). Columbia having won a jury verdict at trial, we consider the following facts in the light most favorable to plaintiff.

Columbia was a company specializing in the manufacture and marketing of aluminum culvert pipe with a plant in Vineland, New Jersey. KACC manufactures aluminum sheet and coil from which aluminum culvert pipe is constructed and conveys these materials to its wholly-owned subsidiary KACSI, which in turn sells the sheet and coil to pipe manufacturers such as Columbia. KACSI also fabricates and sells aluminum culvert

2. A direct appeal was taken because defendants failed to file post-trial motions timely. The Court of Appeals, upon defendants' motion, allowed a limited remand to this court to have the benefit of the trial judge's views upon the issues in contention.

pipe itself in competition with the fabricators to whom it supplies sheet and coil.

These three entities had a successful business relationship for many years during which Kaiser was Columbia's main material supplier. Beginning in 1971, a four-pronged effort took place to put Columbia out of business in retaliation for Columbia's placing of aluminum orders with Reynolds Aluminum. This KACC/KACSI effort included a refusal to sell to Columbia, a decision to locate a new culvert manufacturing plant within fifty miles of Columbia's plant, setting up Robert A. Kennedy, Columbia's best salesman, in business as an independent distributor of KACSI products, and a "price squeeze" by KACC and KACSI, accomplished by transferring sheet and coil from KACC to KACSI below cost. This allowed KACSI to make a profit on sales of pipe at prices which Columbia could not match; the price of aluminum was increasing and the supply of the metal was severely limited.

The Kaiser defendants move this court for a judgment notwithstanding the verdict, on the ground that Columbia produced insufficient evidence to support the verdict in several material respects. In the alternative, defendants move for a new trial on the ground that the verdict was contrary to law, against the weight of the evidence, and that the court erred in certain evidentiary rulings, in jury instructions, and in submission of certain interrogatories to the jury.

In ruling on a motion for judgment N.O.V., "it is the duty of the trial court to take that view of the evidence most favorable to the party against whom the motion is made, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for him." 6A *Moore's Federal Practice* §59.08[5] at pg. 59-152 (1979). On the other hand, a motion for new trial, on the ground that the verdict was against the weight of the evidence, is addressed to the sound discretion of the trial court. *Id.*

POST-TRIAL MOTIONS – LIABILITY

Defendants' contentions must fail in view of the Circuit Court's opinion in *Columbia Metal Culvert Company, Inc. v. Kaiser Aluminum & Chemical Corporation*, 579 F.2d 20 (3d Cir. 1978), *cert. denied*, 439 U.S. 876 (1978) and the doctrine of the law of the case.

As noted in *Otten v. Stonewall Ins. Co.*, 538 F.2d 210, 212 (8th Cir. 1976):

> This court has repeatedly held that the decision on former appeal is the 'law of the case' on a question presented in that former appeal, *unless the evidence introduced at the subsequent trial is substantially different from that considered on the first appeal*, and must be followed in all subsequent proceedings in such case in both district and appellate courts, unless the decision is clearly erroneous and works manifest injustice. (emphasis supplied, citations omitted).

See, e.g., United States v. American Bag & Paper Corp., 609 F.2d 1066, 1067, n.3 (3d Cir. 1979) (determination by panel of Court of Appeals was law of the case and later panel was bound by it); *Skehan v. Board of Trustees of Bloomsburg State College*, 590 F.2d 470, 482 (3d Cir. 1978), *cert. denied*, 444 U.S. 832 (1979) (Court of Appeals' prior opinions were law governing the case with respect to question of whether it was permissible to remand plaintiff's due process claims to district court and district court's observations on remand were of no effect); *Chlystek v. Kane*, 540 F.2d 171, 173 (3d Cir. 1976) (Court of Appeals governed by law of the case from prior appeal with respect to whether a substantial federal question was present); *Spock v. David*, 502 F.2d 953, 955 (3d Cir. 1974), *reversed on other grounds*, 424 U.S. 828 (1976) (on essentially the same record as was before the Court of Appeals prior to remand, both the district court on remand and the panel of the Court of Appeals on appeal following remand were bound, with respect to issue decided by the Court of Appeals prior to remand, by decision on that issue as the law of the case); *A.M. Webb & Co. v. Robert P. Miller Co.*, 176 F.2d 678, 680-81 (3d Cir. 1946) (on

trial after remand of case, questions settled by Court of Appeals could not be relitigated); *Moyer v. Aetna Life Insurance Co.*, 126 F.2d 141, 143 (3d Cir. 1942) (law of case on prior appeal as to sufficiency of the evidence on certain points precluded reconsideration thereof upon defendant's appeal of district court denial of judgment N.O.V. after second trial).

This court is bound by the Third Circuit's decision on issues presented and decided explicitly or implicitly in the prior appeal. *See, Todd and Company, Inc. v. SEC*, 637 F.2d 154 (3d Cir. 1980). For this reason we reject Kaiser's initial contention in its brief in support of post-trial motions, that because KACSI is "wholly owned and controlled" by KACC (Defendant's Brief in Support of Motions at 2), the two corporate entities are incapable of a conspiracy for lack of the requisite plurality of actors. The Third Circuit explicitly rejected this argument as "not well-founded in law," and reaffirmed the viability of the "intra-enterprise conspiracy theory" as applied to separate corporate entities. *Columbia Metal, supra* at 33. *See, Cromar Company v. Nuclear Materials and Equipment Corp.*, 543 F.2d 501, 511 (3d Cir. 1976) (absence of the appearance of competition between parent corporation and wholly-owned subsidiary not a bar to Section 1 Sherman Act liability.) This court may not reconsider that determination.

A simililar fate befalls Kaiser's contention that there was insufficient evidence to support a finding of an unlawful conspiracy between KACC and KACSI, insufficient evidence to support a finding that KACC or KACSI had a specific intent to monopolize or to wilfully maintain monopoly power, insufficient evidence to support a finding that the relevant product market was aluminum culvert and drainage pipe alone, and insufficient evidence to support the court's charge on the price squeeze issue. The Third Circuit explicitly found the evidence sufficient to allow a jury to find for Columbia on each of these points. *Columbia, supra* at 37.

The law of the case doctrine precludes a reconsideration of that determination unless the evidence at the second trial was *substantially* different from that considered by the appellate court. *Otten, supra.* However, the evidence which the Court of

Appeals found sufficient as to each of these points was substantially repeated in the second trial.

Product Market

The evidence persuasive to the Third Circuit on the product market issue, *Columbia, supra* at 29-31, essentially repeated itself at the second trial. For example, there again was testimony that aluminum is a specialty material[3] and that there are specialized vendors of aluminum products.[4] Several witnesses testified that the physical properties of the three types of manufactured culvert pipe, steel, concrete and aluminum, differ significantly.[5] Because of these differences, evidence at the second trial again showed that specifications for construction projects require one type of culvert rather than another.[6] From this evidence a jury might infer that distinct markets exist for aluminum, steel and concrete pipe, at least from the contractor's point of view. *See, Columbia, supra,* at 28.

The record here shows, as did the record before the Court of Appeals, that a jury would not act unreasonably in finding that, "patterns of action on the part of engineers who specify the type of culvert to be used establish aluminum as a separate market." *Columbia, supra* at 28. Again, there is testimony that price was not a crucial factor in these engineering decisions[7] and

3. *E.g.,* N.T. 248 (Bonjorno) (". . . aluminum was always a specialty product. It was during the sixties, and it was during the early seventies, and it was at the period and point in time that we're talking about. . . ."); N.T. 681 (Arvay) (". . . aluminum again becomes a very highly specialized product. . . ."); *See,* Plaintiff's Brief in Opposition to Defendants' Motions at 9.

4. *E.g.,* N.T. 2848 (specialized in aluminum "as far as a storm drainage product. . . . "); N.T. 17 (Bonjorno).

5. *E.g.,* NT. 874, 879, 882-883, 885-886, 888-889, 893-894 (Elam). *See,* Plaintiff's Brief in Opposition to Defendants' Motions at 9.

6. *E.g.,* N.T. 904, 915, 916 (Elam); N.T. 1698 (Price).

7. *E.g.,* N.T. 919 (Elam) (". . . you are going to specify that product in most instances where price is not even a factor . . ."); N.T. 680 (Arvay) (". . . as far as the price situation is concerned, that is not the concern to them . . . ."); N.T. 1701 (Price); *See,* Plaintiff's Brief in Opposition to Defendants' Motions at p. 8.

that the three culvert products are neither interchangeable nor in competition from an engineering standpoint.[8]

Defendants also argue that steel and aluminum culvert may share the same production facilities as an indicia of products in the same market for Sherman Act purposes. The fact that the same production facilities can be used to turn out steel and aluminum culvert and even the fact that companies often manufacture both products is insufficient to preclude the existence of separate markets as a matter of law; *Columbia, supra,* at 29 n.30.

Defendants vigorously assert that the evidence does not support the jury's finding of an aluminum culvert product market. (*See,* Defendants' Brief in Support of Motions at pp. 99-109). Defendants point to extensive testimony, particularly that of defendants' expert, Dr. Epstein, supportive of their view. But the jury rejected defendants' testimony on these points and accepted that of the plaintiff; the Court of Appeals has already determined that plaintiff's evidence would reasonably support such a jury finding.

Thus this court accepts the jury finding of an aluminum culvert pipe product market, as sufficiently supported by the evidence.

Unlawful Conspiracy Between KACC and KACSI

The evidence found sufficient to prove unlawful conspiracy between the defendants, *Columbia, supra* at 34-35, was also placed before the jury in the second trial. Again there was evidence that KACC and KACSI combined to impose a price squeeze. For example, there was evidence from which the jury could infer that Collins of KACSI had no part in setting the

8. *E.g.,* N.T. 1408 (Chafin) (". . . it [aluminum] has inherent characteristics which are different from the other materials . . .); N.T. 918 (Elam):

> "Q. Now taking your professional group, the Drainage Engineers and engineers who design drainage systems and design culvert and specify different commodities of culvert, in your opinion, does that group view these products, steel, aluminum and concrete as interchangeable?"
>
> "A. No, I don't think they do."

specification price of coil, which was a KACC price (N.T. 171, 1972, 1957), that Collins was chastised by KACC for not getting prices up high enough (P-950, N.T. 2277, 2281, 2560), that Collins reported to the Sheet and Plate Division of KACC (N.T. 2307, 1718-20), that someone higher than Collins was responsible for the price increase crucial to this litigation (N.T. 1972), that KACC transferred coil to KACSI below cost (N.T. 1964, P-823) and that Collins' request for a plant in New Castsle, Delaware was approved by KACC (N.T. 1792, 2114, 2317, 2372, 1976, P-204, 210). *See,* Plaintiff's Brief in Opposition to Defendants' Motions at pp. 12-13. From this and other information adduced at trial, the jury might again infer that "the pricing policies of KACSI were not independent . . . but rather arrived at jointly with KACC." *Columbia,* 579 F.2d at 35. Although there was evidence from which a contrary finding might have been made (*see,* Defendants' Brief in Support of Motions at pp. 32-59), we find the evidence was sufficient to support the jury's conclusion that KACC and its wholly-owned subsidiary, KACSI, conspired in violation of the Sherman Act.

Intent to Monopolize

Defendants argue that plaintiff's evidence was insufficient to support the jury's finding that the Kaiser defendants monopolized or attempted to monopolize in violation of Section 2 of the Sherman Act (*see,* Defendants' Brief in Support of Motions at pp. 60-99). Judge Cahn's directed verdict for defendants on this issue at the first trial resulted from his related finding that steel and aluminum, rather than aluminum culvert pipe alone, must constitute the relevant product market. The Third Circuit, as discussed above, found that it was not unreasonable to conclude that culvert pipe alone constituted a relevant market, and therefore that "the foundation of the directed verdict on the §2 count collapses." *Columbia,* 579 F.2d at 31. The Court of Appeals also stated that there was sufficient evidence to infer that KACSI, an entity controlling 80% of the market, attempted to drive Columbia out of business. *Columbia,* 579 F.2d at 31. That same evidence persuasive to the Court of Appeals was

presented to the jury at the second trial. Holmes Collins' threat to place an aluminum culvert plant near Columbia if Columbia purchased from Reynolds, and the later placement of a plant in New Castle, Delaware (N.T. 1228) that was originally planned for Virginia, (N.T. 1533, 1540-1541, 1730), were submitted to the jury. Again, there was evidence that, "transportation of culvert is a significant item of expense for the product in question and a local manufacturer of culvert has an advantage over one whose plant is at a distance from the place of delivery" (*Columbia, supra* at 31), from which the jury might infer intentional harm caused Columbia by Kaiser's placement of its plant (N.T. 2317-2318, 2840). Again, an inference could be drawn from evidence that the Delaware KACSI plant sold culvert at lower prices than other plants even though Delaware costs were no lower (N.T. 1734, 2544-2545), that KACC transferred sheet and coil to KACSI at an accounting price less than production cost and well below market price (N.T. 1964, 3654), and that Collins of KACSI extended credit to Kenned*y*, formerly a Columbia salesman, against the recommendation of the KACSI credit department (N.T. 1849-1863, 2525-2529, 2842-2849, 2854, 2997, Exhibits P-75, P-24, P-5). The Arvay testimony, specifically noted by the Third Circuit, *Columbia, supra* at 31, n.43, again supported plaintiff's theory (N.T. 719, 729, 752). Finally, an inference that Kaiser controlled more than 80% of the relevant market was again reasonably supported by the evidence. (N.T. 73-75, 780, 1261, 1809, 1810, 1814, 2509, Exhibit P-201). Therefore, the evidence was sufficient to support the jury's conclusion that the defendants monopolized or attempted to monopolize in violation of Section 2 of the Sherman Act.

In summary, on the liability issues, the evidence on retrial was not substantially different from that considered by the appellate court and must be deemed sufficient to support the jury's finding in favor of the plaintiff. Moreover, not only was the evidence sufficient, the court in the exercise of its discretion does not find the jury's determination so against the weight of the evidence as to shock the conscience of the court. Therefore, a new trial would be denied on all issues of liability. The court

has carefully considered all other grounds raised by defendants in their motion for judgment notwithstanding the verdict and, with the exception of ground eleven (11) relating to damages and discussed *infra*, determines them to be without merit.

DAMAGES

The trial of this matter having been bifurcated, after the jury verdict on liability against defendants, two days of testimony on damages followed; the jury, again upon answers to special interrogatories (attached hereto as Appendix B), then found damages in favor of plaintiff in these amounts: 1) $57,000 for increased costs of metal; 2) $1,048,000 for lost profits; and 3) $710,000 for the reduction in the value of Columbia as a going concern. The total damage award by the jury was $1,815,000. The jury's award was trebled in accordance with the remedy provided in Section Four of the Clayton Act, 15 U.S.C. §15; the final judgment in plaintiff's favor is in the amount of $5,445,000.

Defendants raise numerous objections as to the award of damages.

Causation

Defendants argue that plaintiff did not establish the requisite causal link, under Section Four of the Clayton Act, between the financial damage suffered by Columbia and the defendants' violation of the antitrust laws. Defendants assert that they are entitled to judgment in their favor if the damages to the plaintiff were caused in whole or in part by factors other than defendants' violations of the antitrust laws.[9] Defendants assert that Joseph Bonjorno, Columbia's chief witness and shareholder, on cross-examination identified several reasons, other than defendants' activities, for losses suffered by Columbia during the relevant time period. Among those causes cited by defendants are: the recession in the construction industry,[10] a nationwide aluminum

9. *See,* Defendants' Brief in Support of Motions for Judgment N.O.V. or for a New Trial at p. 11 (citing cases).
10. *See,* N.T. 3903-3905.

shortage,[11] the inability of Columbia to obtain price protection from suppliers,[12] and the unstable financial condition of Columbia's chief financial backer, George Kerr.[13]

Damages attributable to an antitrust violation are recoverable even when factors other than defendant's wrongful acts alone may have contributed to the plaintiff's injury. 15 ANTITRUST LAWS AND TRADE REGULATION §115.01[2] (1978). In this case there was sufficient evidence, if accepted by the jury, to show that Columbia's business decline was caused by Kaiser's illegal activity. Mr. Bonjorno stated repeatedly, both on direct and on cross-examination, that the injury to Columbia was caused by Kaiser's illegal activity.[14] He also stated that in projecting damage figures he had considered the legal competition of others in the marketplace. (N.T. 3971). He further stated that the damage projections did not go beyond a point where it was simply too difficult to determine "who was responsible for what" (N.T. 3858). When cross-examined as to other possible causal factors in Columbia's decline, Bonjorno either asserted that these factors were not significant or that Kaiser's illegal activity had made Columbia particularly vulnerable to troubles that, absent such wrongdoing, would not have created financial problems.[15] The jury had before it, through this adept cross-examination, those other factors. However, the jury found that Kaiser's illegal activity caused the financial harm suffered by Columbia. Damages for injury by antitrust violations may be implied even though other factors may have contributed to the injury. *See, Bigelow v. RKO Radio Pictures, Inc.,* 327 U.S. 251, 264-265 (1946); *Switzer Brothers, Inc. v. Locklin,* 297 F.2d 39 (7th Cir. 1961), *cert. denied,* 369 U.S. 851 (1962). Here, plaintiff did show, with the requisite reasonable certainty, an injury in consequence of Kaiser's conduct. *See, Pitchford v. PEPI, Inc.,* 531 F.2d 92 (3d Cir. 1976), *cert. denied,* 426 U.S.

11. *See,* N.T. 3908, 3909.
12. *See,* N.T. 3911-3918.
13. *See,* N.T. 3919, 3920.
14. *E.g.,* N.T. 3864, 3865, 3902, 3904.
15. *E.g.,* N.T. 3907, 3908, 3910, 3912, 3913.

935 (1976). Judgment notwithstanding the verdict on causation would be improper.

Duplication in Damages Award

Defendants assert that, when the jury returned a verdict of $1,048,000 for loss of profits during 1974-1977 and $710,000 for the reduction in the value of plaintiff's business as a going concern as of May 1, 1977, Columbia was awarded a double recovery for the same loss. Defendants' theory for this duplication argument is not clear but seems to include these contentions. Defendants first argue that plaintiff's recovery of lost profits in this action together with the amount received from the sale of Columbia's assets to Howmet in 1977 for $574,000 fully compensated plaintiff for its losses because the value of Columbia as a going concern was the amount received from Howmet at the time of sale. Receiving damages for business as a going concern under this theory duplicates the money paid Columbia by Howmet in 1977 *not* the lost profits awarded by the jury at trial. A part of this argument is that either Howmet paid for Columbia's total going concern value as of May, 1977 (including goodwill) or that Howmet bought only Columbia's assets; i.e., all Columbia had left at that time, as Columbia itself asserts. If the latter is the case, Kaiser argues that projected lost future profits should not add to a going concern value since Columbia, defunct as of 1977, could have no future profits.

Defendants next contend that the method of calculating the damage to Columbia as a going concern caused a duplication between the two theories of damage recovery. Defendants state that the same figures used to calculate past lost profits, were used to project Columbia's profits into the future, post 1977, to arrive at a going concern value. (A going concern value indirectly reflects future profits as "[t]he current market value of a business is, in theory, the discounted present value of the estimated flow of future earnings." *Glauser Dodge Co. v. Chrysler Corp.*, 418 F. Supp. 1009, 1023 (D.N.J. 1976), *reversed on other grounds*, 570 F.2d 72 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978) *rehearing denied*, 438 U.S. 908

(1978).) This, defendants maintain, created an impermissible duplication since the same figures establish both damage theories.[16] Finally, defendants argue that a recovery for going concern value and lost profits is generally not allowed.

We will deal with the last contention first. As noted in 15 ANTITRUST LAWS AND TRADE REGULATION §115.03[1] (1978), "there are three types of damages that a successful antitrust plaintiff may recover under Section 4: (1) increased costs; (2) lost past net profits; and (3) reduction in the value of the business. *Absent unique circumstances, these three types are not duplicative of each other.*" (emphasis supplied). Numerous cases support this general proposition. *See, Story Parchment Co. v. Patterson Parchment Paper Company*, 282 U.S. 555, 561 (1931) ("[t]he trial court submitted to the jury for consideration only two items of damages, (1) the difference, if any, between the amounts actually realized by petitioner and what would have been realized by it from sales at reasonable prices except for the unlawful acts of the respondents' and (2) the extent to which the value of the petitioner's property had been diminished as the result of such acts."); *Glauser Dodge Co. v. Chrysler Corp.*, 418 F. Supp. 1009, *supra*, (involved damages for both lost profits and going concern value); *Eiberger v. Sony Corp. of America*, 622 F.2d 1068, 1081 (2d Cir. 1980) ("[t]he district court ruled that ABP was entitled to compensation for two categories of injuries—lost profits on sales that were prevented prior to the termination of its Sony dealership, and the reduction in the value of ABP's business resulting from the termination"); *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575 (5th Cir. 1980) (lost profits and goodwill loss, determined in part by reference to potential for future profits); *Albrecht v. Herald Co.*, 452 F.2d 124 (8th Cir. 1971) (sufficient compensation included damages in amount of profits lost prior to the forced sale of the business *plus* its full market value, absent the illegal practices). Thus in this case, absent some unique circumstance, it is clear that plaintiff is entitled to both the lost past profits as of the time of the sale to Howmet and the value of the business, as it would

16. *See*, Defendants' reply brief at P. 51.

have been absent defendants' violation of law, in May of 1977 upon Columbia's termination.

Defendants claim that the method of calculating going concern value created duplication in the damages award since going concern value was calculated, in part, by using the past lost profit figures in order to project potential future profits. Defendants assert that this method allowed plaintiff to recover its lost profits twice. However, several cases, discussing damages calculations in the antitrust area, have explicitly or implicitly endorsed this method of determining going concern value. For example, in *Eiberger, supra,* at pp. 1081-1082, n.25, the court stated:

> 25. Although it is unclear, Sonam may also be arguing that the district court erred when it included in the one-year base period figures an amount for profits that ABP would have earned on sales lost as a result of Sonam's intimidation. Such an argument is clearly incorrect. ABP is entitled to an award that covers all of the profits it would have earned but for Sonam's violation: these include both the profits lost while ABP was still an authorized dealer, and the profits it would have earned after that point, which when capitalized equal 'going concern' value of the lost portion of ABP's business. *See, Farmington Dowel Prods. Co. v. Forster Mfg. Co.,* 421 F.2d 61, 80-82 (1st Cir. 1970). *To exclude lost profits from the base period figures used to project the latter component would be to reduce plaintiff's award for the later period precisely because defendant's intimidation had been successful in the base period. Such a reduction would obviously be improper.* (emphasis supplied).

Similarly, in this case, it was appropriate that the calculation of Columbia's value as a going concern included as its base figure, not the past profits depressed by defendants' violations, but the past profit history as it would have been but for the violation.

Of similar import is *Copper Liquor, Inc. v. Adolph Coors Co., supra* at 579 n.9, where the court described the calculation of a retail liquor store's goodwill value, in a case where plaintiff

sought both lost profits and good will:[17]

> 9. Relying on the assumption that the store reduced its markup from 25 percent to 15 percent in 1966, Green calculated the store's goodwill value by adding the lost gross profits for each year of the store's operation to the net profits for the store as they appeared on the store's corporate income tax returns. The sum of lost gross profits and net profits for the four years, 1967 to 1971, was identified as adjusted net income. Adjusted net inome, in the amount of $100,046, was divided by the number of years to obtain average net income. Mr. Green then subtracted from average net income the store's return on capital computed at 6 percent per year to derive average net income after return on investments. This figure, $21,980, was multiplied by five to arrive at a goodwill value of $109,899.

Again past lost profits were taken into account in the figure from which goodwill was projected. Finally, by way of example, the district court in *Glauser, supra* at 1023 n.14, made the following observations on this point:

> 14. Since the challenged practices continued for several years leading up to the elimination of Glauser Dodge from the marketplace, the plaintiff properly presented to the jury estimates of the value of the business as a going concern based upon its actual performance in prior years *and, alternatively, based upon the earnings which the business would have had absent the defendants' unlawful conduct.* (emphasis supplied).

In the instant situation, then, we find no merit to defendant's contention that the method of computation used in this case created a duplication.[18] Rather, by adding Columbia's

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17. "Valuing a business's goodwill, of course, is a subjective determination that takes into consideration factors such as a business's age, profit history, customers, and *potential for future earnings.*" (emphasis supplied). Copper Liquor Co., *supra,* at 579 n.8.

18. Defendants' cited cases can be read to support plaintiff's position. Rea v. Ford Motor Company, 497 F.2d 577 (3d Cir. 1974), *cert. denied,* 419 U.S. 868

estimated profit figures in those prior years and then projecting forward for future profits, Columbia quite appropriately measured its value as a going concern from its estimated 1977 condition had there been no prior damage caused by defendants. Necessarily, this method creates a projection based upon a projection but it is defendants' prior misdeeds that make such a formulation necessary.

Finally, we consider defendants' contention that Columbia's recovery for going concern value duplicated the amount received in 1977 when Columbia transacted its sale to Howmet. Plaintiff asserts that the transaction with Howmet was a sale of assets only, since Columbia, having been destroyed as a business by Kaiser, had no good will value left. Both Bonjorno[19] and Dr. Kuehn so testified.[20] If this is the case, Kaiser argues that

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NOTES *(Continued)*

(1974), involved a finding of double recovery under the Automobile Dealer's Act where the damages for lost future profits did not reflect the fact that plaintiff had sold certain assets for $60,000. Defendants cite it for that proposition. However, the court in Rea, at 587 n.19, stated that "neither the trial judge's instructions on damages nor Dr. Staelin's estimate made mention of or took into account the benefit 22 Ford received from the cash. . . ." Clearly the Howmet purchase price was taken into account in this case; defendants' in their Reply Brief at p. 51 note Dr. Kuehn's assumptions regarding the Howmet sale in the going concern value computation. Also, in Farmington Dowel Products Co. v. Forster Mfg. Co., 421 F.2d 61 (1st Cir. 1969), *supp. order*, 421 F.2d 91 (1st Cir. 1979), cited by defendants, the court allowed plaintiff to recover both its lost profits to the date it went out of business and the going concern value of the plaintiff on that date.

19. N.T. 3864 (Bonjorno):

"A. Well, we--as long as we were operating we had our good name. We had our reputation and our ability to maufacture a high quality product, our ability to manufacture a high quality product, our ability to work and get our product specified. This as all part of Columbia Metal and its good name in the aluminum culvert pipe industry in the trading area, and they effectively destroyed this.

Q. Who is they?

A. Kaiser Aluminum."

20. N.T. 4041 (Kuehn):

"Q. Well, do you make an assumption as to what the actual value was as a going concern on May 31, 1977?

there was no reasonable prospect that Columbia would have earned profits in the future. However, Columbia's value as a going concern, that is its market value to Howmet, would certainly have been greater if its goodwill, and thus its potential for future profit, were intact.[21] If Howmet paid only for tangible assets, Columbia did not receive the worth of its business absent the violation which destroyed its goodwill. If Columbia indeed had no reasonable prospect of future profits, that indicates more damage to Columbia, not less damage to its going concern value.

As an alternative characterization, defendants assert that whatever intangible value Columbia had, assuming it had some, was paid for by its 1977 purchase by Howmet. It was plaintiff's express assumption that Howmet bought only tangible assets (N.T. 4041) and that its projection of ". . . the value of the business was computed in terms of whether the rates of return from the operation of this business in the absence of damage produced or would have produced a return in excess of the profits that might be expected from the tangible assets alone. In other words, was there additional profit that would then be attributed to intangibles which would indicate some value of good will relative to the operation of the business." (N.T. 4039-4040). *Compare*, *Pitchford v. PEPI, Inc.*, 531 F.2d 91 (3d Cir. 1975) (failure to deduct Mr. Pitchford's salary as a cost of

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A. Yes.

Q. What is that?

A. Well, the assumption is that the value of the firm on that date was limited to physical assets, and consequently that there was no operating value beyond the sheer value of the assets that existed.

Q. And based on what you know about this case, is that a reasonable assumption?

A. Given that--given the actual operation of the firm in the previous years in the damaged state, I would say yes."

21. *See*, Copper Liquor, Inc., *supra*, at 579 n.8:

"According to Cook's expert, Wayne Peters, goodwill is the amount that a purchaser would be willing to pay for a business *over and above the value of the business's tangible assets*. Valuing a business's goodwill, of course, is a subjective determination that takes into account factors such as *potential for future profit*." (emphasis supplied).

operation from data used to project potential earnings for the purpose of evaluating the lost going concern value of Pitchford created a double recovery).

On cross-examination, Dr. Kuehn, confronted with the purchase agreement between Howmet and Columbia, which allocated $16,000 of the purchase price for intangibles,[22] stated that amount should be subtracted from certain of his estimates, since his projections assumed the Howmet sale involved assets only.[23] Whatever amount was actually received for intangibles must be subtracted from the estimates to avoid an award of damages for an amount that is duplicative in the sense that it has already been recovered.

Increase in Metal Costs

Plaintiff claimed damages for lost profits for the years 1974, 1975 and 1976 but in addition made a specific claim for extra costs attributable to an increase in the amount of aluminum coil used in 1971, 1972 and 1973; plaintiff contended this increase in metal cost was caused by the misrepresentations of defendants concerning the gauge of aluminum Kaiser would continue to use. The Stamco machine plaintiff installed in the spring of 1970 utilized a 2-inch gauge because Kaiser used that gauge; the rest of the industry used a 2-⅔-inch gauge. Kaiser, which had used 2 inch, then converted to 2-⅔ inches; plaintiff contends that Kaiser concealed its intention to do this to put plaintiff at a competitive disadvantage. This had been presented to the jury

22. Corporate name and covenant not to compete.

23. N.T. 4149 (Kuehn):

> "According to the figure I just saw, the purchase price of the tangible assets apparently would be $564,000 and consequently, if I understand it correctly, $16,000 should probably be subtracted from the various estimates presented here on the bottom lines for both the capitalization at 15% and the capitalization at 20%."

However, Dr. Kuehn also indicated that the two items on the intangibles line of the purchase agreement actually had no worth. *See*, N.T. 4146 (corporate name); N.T. 4147 (covenant not to compete). (For the other inadequacies of Dr. Kuehn's testimony, see N.T. 4018-4019, 4050-4051, 4089, 4092-4093, 4108-4109, 4111.)

during the trial on liability, not as an antitrust violation in itself but as a part of a pattern of conduct from which retaliatory conduct could be inferred. Plaintiff admitted it could not isolate damages for other aspects of its proof on retaliatory conduct but urged that a finding of specific damages for extra use of coil was appropriate. Because plaintiff stated to the jury that damages would be claimed only for 1974, 1975 and 1976, the court was in error in allowing the extra cost of metal for prior years to go to the jury as a separate item of damages; that plaintiff was able to isolate it as a matter of proof (N.T. 3981-3995) is not a sufficient reason to allow it as an item of damages in the context of the trial as a whole. Therefore, the award of $57,000 ($171,000 trebled) is set aside and the defendants' motion for judgment notwithstanding the verdict is granted as to that amount.

Sufficiency of the Evidence as to Amount of Damages

We recognize that once the fact of injury has been proven, the burden on the antitrust plaintiff to establish the "precise amount of damages is not as great as in other kinds of lawsuits." 15 ANTITRUST LAWS AND TRADE REGULATION §115.01[2] at 115-5 (1978). *See*, *J. Truett Payne Co. Inc. v. Chrysler Motors Corporation*, 49 U.S.L.W. 4516 (1981); *Copper Liquor Inc. v. Adolph Coors Co.*, 624 F.2d 575 (5th Cir. 1980) (less rigid standard of proof with respect to amount of damages caused by an antitrust violation); *Hobart Brothers Co. v. Malcolm T. Gilliland Inc.*, 471 F.2d 894, 902 (5th Cir. 1973), *cert. denied*, 412 U.S. 923 (1973) ("[i]n an anti-trust case the burden on the plaintiff to prove the amount of damages is less severe than the burden to prove the fact of injury . . . ."); *South-East Coal Company v. Consolidation Coal Company*, 434 F.2d 767, 796 (6th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971), *rehearing denied*, 404 U.S. 877 (1971) ("The antitrust cases are legion which reiterate the proposition that, if the fact of damages is proven, the actual computation of damages may suffer from minor imperfections . . . . "). However, a plaintiff must offer proof as to the extent of injury, showing that the damage involved is measurable in dollars. *See*, *Deaktor v. Fox Grocery*

Company, 475 F.2d 1112 (3d Cir. 1973), *cert. denied*, 414 U.S. 867 (1973). Further, courts have stated repeatedly that the measure of damages may not be based upon mere guesswork, speculation, or conjecture. *E.g.*, *Bigelow v. RKO Radio Pictures, Inc.*, *supra*; *Story Parchment Co. v. Paterson Parchment Paper Co.*, *supra*; *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 184 F. Supp. 440 (E.D. Pa. 1960), *aff'd*, 297 F.2d 199 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962).

Although plaintiff did show economic injury in consequence of defendants' conduct, the evidence presented by Columbia as to the actual dollar amount of damages suffered was so deficient as to require a new trial on damages only. The evidence presented by Columbia's two damages witnesses, Bonjorno and plaintiff's expert witness on damages, Dr. Alfred Kuehn, was incomplete, confusing and generally lacking in probative value. The factual basis of the projections, predictions and calculations presented by them was never clear from the testimony.

Plaintiff estimated damages sustained in lost profits and in the decline in value of the business as a going concern by using four projection Methods (Methods C, D, E, and F). Method C (P-3012), projected Columbia's sales based upon government figures on new housing starts and new highway construction during the damages period. Method D (P-3013) projected Columbia's sales by utilizing defendant Kaiser's nationwide sales, while method E (P-3014) used Kaiser sales from the New Castle, Delaware plant only. Method F (P-3011) relied upon Joseph Bonjorno's estimates of Columbia's potential sales and profits were it not for defendants' wrongdoing.

The testimony of an antitrust plaintiff who is an owner or officer of the damaged business may be sufficient to support a jury verdict on damages where the owner is qualified by experience and position to make damages estimates. *See, generally, Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 122, 23 L.Ed.2d 129, 89 S.Ct. 1562 (1969) (Zenith's officers, experienced businessmen, testified that repressive effects on Zenith were due to patent pool; no basis in record for refusing to accept testimony of the two officers as probative evidence);

Greyhound Computer v. International Business Machines, 559 F.2d 488, 507 n.41 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (most of the damages testimony came from Greyhound's president; where the record reflects his competency and the factual basis for his conclusions, an interested witness may testify as to the amount of damage and it is for the jury to determine the weight to be accorded his testimony); *Kestenaum v. Falstaff Brewing Corp.*, 514 F.2d 690 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976) (wholesale distributor's estimation of good will value of his business admissible in antitrust suit as an owner is competent to give his opinion on the value of his property; weight and credibility given owner's testimony is generally for the jury); *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 394 (9th Cir. 1957), *cert. denied*, 355 U.S. 835 (1957) ("We do not hold or imply that a jury verdict could not be upheld under any circumstances solely on the testimony of the plaintiffs. We hold only that if they are qualified to make these estimates, the record must show their competency and the factual basis upon which they rest their conclusions. . . .").

But an inexperienced owner using purely speculative bases for his estimations of damage may provide testimony of such minimal probative force as to warrant a judge's refusal to submit the issue to the jury. *See, Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 184 F. Supp. 440 (E.D.Pa. 1960), *aff'd*, 297 F.2d 199 (3d Cir. 1961, *cert. denied*, 369 U.S. 839 (1962). It follows that such testimony would justify the grant of a new trial in the exercise of the court's discretion.

We do not find that Mr. Bonjorno was an inexperienced owner who was not qualified to make damage estimates. Bonjorno started Columbia in 1959 and performed proprietary, managerial and sales functions from Columbia's beginning until its assets were sold in 1977. However, we do find the record insufficient in establishing the requisite factual basis for Bonjorno's estimates so that the jury could make a rational determination as to their accuracy.

For example, Bonjorno estimated Columbia's return on sales at 17.6% for 1974, 12% for 1976 and 8% for 1977, all significantly higher than that of any previous year of Columbia's

operation; the previous high was only 5.8%. Bonjorno's explanation for this increase demonstrates the minimal evidence upon which this five million dollar verdict rests:

N.T. pp. 3959-3960:

"Q. What was the reason why you projected so much greater profitability in 1974 than you had experienced in your entire history?

A. A number of reasons, Mr. McElroy.

Number one, we would have had a much lower metal cost due to the new configuration. The fact that we were making standard corrugated pipe meant that the material costs would be down by approximately 4 to 5%.

Q. All right.

A. We now were in a position to offer perforated pipe made on our own perforating mill, which would have been a highly profitable product, also, and would have given us an access to other markets.

It would have also given us a much higher percentage of profit in those areas that were remote to southern New Jersey, because the prices were better in areas away from southern New Jersey than they were in the southern New Jersey area, so that we felt we would have a substantially greater margin of profit on the sales that we projected.

Q. So that you would have increased your profitability from 2.6% to 17.6% in one year? That's an increase of 15%.

A. I thought that was reasonable."

N.T. pp. 3958-3959

"Q. You've projected, in 1974, $1,805,569 in sales and you have an income of $318,683.

Do you know what that percentage is?

A. It looks like its around 15%. I'm not sure without calculating it.

Q. It is 17.6%. 17.6%.

Now, on Exhibit 3062 is there any year in which return on sales exceeded 10%?

A. No, there is not.

Q. Is there any year in which it exceeded 5%?

A. No, there is not.

Q. Isn't there one? 1971?

A. 5.8, I'm sorry.

Q. 5.8% and that was the best year, 5.8%?

A. Yes.

Q. And yet, you projected an income of 17.6% here?

A. Yes."

Also troubling was Bonjorno's estimate as to the pounds of metal sold in 1973 by Columbia, a critical figure since 1973 was the base year selected by the plaintiff as his starting point for all other damage calculations and projections. Although Bonjorno did state a figure before the jury (N.T. 3932: "[a]pproximately, I think they are about 2.3 or 2.4 million pounds, approximately."), the basis in fact or source of the figure was never explained. (N.T. 3932-3942). For example, at N.T. 3933,

"Q. And did you make a compilation for this trial so you could present it to the Court and jury of what the number of pounds were of metal that Columbia sold in 1973?

A. No.

Q. Didn't counsel or anybody--wasn't anybody assigned to go through the records to find out exactly what the total number of pounds was?

A. It's possible, but I didn't do it.

Q. And you are unaware of anybody else doing it?

A. It's possible that counsel may have done it. I am sorry, maybe I misunderstood your question.

Q. My question was, do you know whether anybody did it or not?

A. I don't know specifically.

That the jury was unpersuaded by the Bonjorno testimony is plain from its damage verdict on lost profits which virtually

cuts the Bonjorno estimate in half. The Bonjorno testimony of his hopes and aspirations fails to provide evidence of facts from which the jury's calculation may be logically and legally inferred.

There are similar problems regarding the damages testimony of the expert, Dr. Kuehn. Again, the problem of the pound figure for 1973 without a source appears.

"Q. Why did you convert it back to pounds?

A. Only to provide a base number for the subsequent calculation of other ratios.

Q. But the number of pounds doesn't represent what Columbia actually sold in 1973, does it?

A. I --

Q. That you calculated.

A. Since I am not sure that anyone knows precisely what the pounds are, it probably doesn't represent accurately, but it's the calculation that was obtained this way and which Mr. Bonjorno considered a fairly accurate estimate of what the actual figure was during that period.

Q. Did you review any of Columbia's books and records to determine whether or not your estimate of the number of pounds sold by Columbia for fiscal year ending May 1, 1973, was accurate or not?

A. I reviewed some records, but to the best of my knowledge--I am not sure whether one can determine precisely whether it's accurate or not. *I certainly didn't establish that it's accurate.*" (N.T. 4092-4093) (emphasis supplied).

The confusion with regard to that particular figure was merely symptomatic of the general confusion and ill-preparedness of the witness, which was admitted by plaintiff's attorney in his closing argument to the jury:

Dr. Kuehn I think was poorly prepared to defend that basic computation that he gave you. It took him too long and he should have been better prepared. (N.T. 4197).

While recognizing the importance of expert testimony in antitrust proof of damages, 16 A.L.R. Fed. 14, 22 (1973),[24] and the fact that Dr. Kuehn qualified as one competent to offer an opinion in such matters, we determine that the illusion of complete accuracy created by graphs, charts, and garbled expert testimony created a speculative verdict in this case. *See, Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 912 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962) ("The leap required to derive any rational conclusion from the expert's data was too great to allow a jury to take.").

Of the methods for calculating plaintiff's damages, we have already considered Method F that relied upon the estimates of Joseph Bonjorno. Method C, that projected Columbia's sales based upon government figures on new housing starts and new highway construction, was completely repudiated by the testimony of plaintiff's expert. Dr. Kuehn could not explain the relevance, if any existed, of these figures to Columbia's business or to its losses:

"Q. And the Federal Government publishes statistics on new highway construction?

A. Data are published on both, yes.

Q. On both what?

A. Highway construction and housing.

Q. Now, the highway construction, that's new highways, isn't it?

A. That's correct.

Q. That does not include reconstruction, maintenance or repair, does it?

A. That's correct.

Q. And the housing starts are new housing starts?

A. It's based on new housing, yes.

Q. That would not include reconstruction or repair of existing storm sewers, for example?

A. That's correct.

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24. "Measure and Elements of Damages Under 15 USCS §15 Entitling Person Injured in His Business or Property by Reason of Anything Forbidden in Federal Antitrust Laws to Recover Treble Damages."

Q. Now, do you know what percentage of Columbia's business was in new highway construction?
A. *I believe very little.*
Q. Most of it was, in fact, in reconstruction and maintenance, wasn't it?
A. That's my understanding.
Q. Do you know whether there is any relationship between new highways and the use of culverts?
A. Well, new highways and aluminum culvert?
Q. Any culvert?
A. *I would assume there is some.*
Q. You assumed it?
A. *Yes, because at least most highways I see, you know, there tends to be some culverts.*
Q. And that's what you based your estimation of damages on, your assumptions, that when you go along the highway you see some culverts along the road?
A. I used this method as the first of four methods since certain data were here I certainly didn't think it was perfect.

I thought it might be related, but that is precisely why in my explanation of which of the varous methods I preferred *I listed this as probably the poorest of the four methods.*

I don't consider this necessarily a very good index." (N.T. 4050-4051) (emphasis supplied).

The remaining two methods, utilizing Kaiser nationwide sales (Method D) and Kaiser New Castle sales (Method E), were never adequately explained to the jury. (N.T. 4018-4019).

Although the "yardstick" measure of an antitrust claimant's lost profits, under which the claimant recovers the difference between his net profits during the damage period and the net profits earned in a comparable business unaffected by antitrust violations, is a valid method of estimating damages, 16 A.L.R. Fed. 14, 45 (1973), in this instance the evidence presented was insufficient to establish that the entities used were truly comparable or that the estimates were adjusted to reflect the

differences between the businesses compared. *See, Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *William Goldman Theatres, Inc. v. Loew's, Inc.*, 69 F. Supp. 103, *affirmed*, 164 F.2d 1021 (3d Cir. 1946).

Lapses of this nature are frequent in Dr. Kuehn's testimony. Kuehn never could explain how the comparisons in Methods D and E were made in view of the fact that Columbia operated on a fiscal year and Kaiser operated on a calendar year (N.T. 4057-4068). Kuehn maintained that the calendar year fiscal year problem would make little difference, however he admitted that he had never calculated it to so determine. (N.T. 4089). Kuehn relied upon the 17.5% normal mark-up of former Columbia salesman, Robert Kennedy, in order to calculate Kaiser's average selling price per pound; however, this figure was not of record in the testimony on damages or liability. Kuehn had difficulty explaining why his calculation of damages for cost of goods sold included a variable cost equal to 11.17% of sales. (N.T. 4108-4109), why an interest expense factor of 7.5% was utilized, and how such interest rate was calculated. (N.T. 4111).

Although Dr. Kuehn's confusion is apparent from a reading of the transcript (N.T. 4003-4150), a reading does not make plain the great diffuculty this witness had in responding to questions. On numerous occasions, Dr. Kuehn was unable to answer an inquiry without referring to documents, was unable to find the appropriate figure within the relevant document, and when a figure was located unable to state how it was calculated or why it was used. All of this shuffling of paper and accompanying long silences occurred before the jury. At one point it was necessary to call a luncheon recess in order to give Dr. Kuehn sufficient time to answer a question posed upon cross-examination. The total effect was that of a witness who did not know what he was talking about; therefore, the jury could only rely upon charts and figures, the factual basis for which had not been adequately established or explained.

We also recognize that a flexible standard of proof applies where the defendant's wrong doing, here the destruction of plaintiff's business, has made it impossible, as a practical matter,

for the plaintiff to produce a more precise figure, *see, Bigelow, supra* at 262-266, but in this case the brief trial on damages seemed almost an afterthought following the extended trial on liability. Plaintiff's action was originally instituted in 1974. The delay occasioned by the directed verdict for defendants at the end of the plaintiff's case at the first trial and the subsequent appeal prior to the instant trial on remand may be responsible for some of the deficiency in proof. It seemed obvious to the court that plaintiff's expert, a well-qualified and experienced witness, must have understood the basis for his conclusions when they were initially stated. However, on the witness stand as of the date of this trial, Dr. Kuehn was unable to explain, at least in an unconfused manner, the derivation of his figures or their basis in fact notwithstanding the time provided to him by the court for this purpose. Whatever the reasons for this inability, the trial court is convinced that the jury verdict could only be a product of confusion and speculation.

Mindful of the delay that has occurred snce the limited remand, and the economic loss occasioned to plaintiff thereby in the erosion of the money judgment due to the difference between legal interest and the market rate, we are reluctant to incur even further delay and have considered whether the delay itself is a reason not to disturb the verdict of the jury. We also gave serious consideration to ordering a remittitur, an action within the trial court's discretion where a jury awards an amount the court deems excessive. 15 ANTITRUST LAWS AND TRADE REGULATION §115.03[2] at p. 115-70 (1978); however, no reasoned basis could be found for setting an appropriate figure. The deficiency in plaintiff's proof of damages convinces the court that the verdict as to damages should not stand.

Where there is no substantial indication that liability and damage issues are inextricably interwoven or that the jury verdict was the result of compromise of liability and damage questions, a second trial on the damages alone is proper. *See, Wagner v. Reading Co.*, 428 F.2d 289 (3d Cir. 1970); *Darbrow v. Brown*, 255 F.2d 610 (3d Cir. 1958); 11 Wright and Miller, Federal Practice and Procedure §2814 (1973). In this bifurcated trial, it is clear there was no compromise of liability and damage

questions. The separateness of the trials is also substantial indication that liability and damage issues are not inextricably interwoven. The court has also considered whether hearing the evidence on liability is necessary to persuade the jury to award damages in an adequate amount and is convinced that the case on liability can be stated to the jury with the facts and inferences most favorable to plaintiff, consistent with the verdict in its favor. Both the plaintiff and defendants will benefit from this opportunity to present damage testimony to the jury in a clear and unconfusing fashion. In any event, fairness to the defendant requires no less.

For the above reasons a new trial as to damages only is granted. An appropriate Order accompanies this Memorandum.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COLUMBIA METAL CULVERT CO., INC.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	No. 74-122

INTERROGATORIES TO BE ANSWERED BY THE JURY

1. (a) Do you find from the evidence that there was a conspiracy between Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. in unreasonable restraint of trade? Yes X No ___

   (b) If your answer to 1(a) is yes, was the conspiracy in unreasonable restraint of trade a material and proximate cause of any injury to the business and property of plaintiff? Yes X No ___

2. (a) Do you find from the evidence that the relevant product market was: [CHECK ONE ONLY]

   (i) aluminum culvert and drainage pipe? X

   (ii) metal culvert and drainage pipe, including pipe made of steel and aluminum? ___

   (iii) culvert and drainage pipe, including pipe made of steel, aluminum and concrete? ___

   (b) If you find the relevant product market was (ii) metal culvert and drainage pipe, including pipe made of steel and aluminum, or (iii) culvert and drainage pipe, including pipe made of steel, aluminum and concrete, you should not answer questions 3 or 4; you have concluded your deliberations.

3. If you find in answer to Interrogatory 2 that the relevant product market was (i) aluminum culvert and drainage pipe, do you find from the evidence:

   (a) that Kaiser Aluminum & Chemical Corp. or Kaiser Aluminum & Chemical Sales, Inc. monopolized the aluminum culvert and drainage pipe market in that it had the power to control prices or exclude competition in the relevant geographic area which was willfully acquired or willfully maintained? or Yes ✓ No ___

   (b) that Kaiser Aluminum & Chemical Corp. or Kaiser Aluminum & Chemical Sales, Inc. conspired with regard to aluminum culvert and drainage pipe to control prices or to exclude competitors in the relevant geographic market? or Yes ✓ No ___

   (c) that Kaiser Aluminum & Chemical Corp. or Kaiser Aluminum & Chemical Sales, Inc. attempted to monopolize the aluminum culvert and drainage pipe market with the specific intent to obtain power to control prices or to exclude competitors and committed an act in furtherance of monopolization which had a dangerous probability of achieving monopolization? Yes ✓ No ___

4. If your answer to 3(a), (b), or (c) was yes, was any such defendants' monopoly, conspiracy to monopolize, or attempt to monopolize as found by you a material and proximate cause of any injury to the business or property of plaintiff? Yes ✓ No ___

You have now completed your deliberations.

The Foreperson will place his/her signature on the signature line below and add the date, and the jury will return to the Courtroom.

/s/ Flora Eikenkoetter

Foreperson

Date: 8/16/79

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COLUMBIA METAL CULVERT CO., INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

INTERROGATORIES TO BE ANSWERED BY THE JURY

1. In what amount, measured in dollars and cents, do you find from the evidence that Defendants caused damage to Plaintiff by reason of an increase in the usage of aluminum coil in 1971, 1972 and 1973?

   State such amount; or "None" in the following blank according to your finding. $ 57,000

2. In what amount, measured in dollars and cents, do you find from the evidence that Defendants caused damage to Plaintiff by profits lost for the years from June 1, 1973 through May 31, 1977?

   State such amount; or "None" in the following blank according to your finding. $1,048,000

3. In what amount, measured in dollars and cents, do you find from the evidence that Defendants caused damage to Plaintiff by reduction in the value of Columbia as a going concern as of May 1, 1977?

   State such amount; or "None" in the following blank according to your finding. $ 710,000

Flora Eiherenkoetter
Foreperson

Dated: 8/21/79
5:30 p.m.

KINDLY ADVISE THE MARSHAL WHEN YOU HAVE COMPLETED DELIBERATIONS.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
	:	
v.	:	
	:	
KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

ORDER

AND NOW, this 17th day of June, 1981, the Court of Appeals having granted a remand for the purpose of determining Kaiser's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial filed by Kaiser, it is hereby ORDERED that:

1. Plaintiff's Motion for Leave to File a Supplemental Brief is GRANTED.

2. The motion of defendants Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. for Judgment N.O.V. is GRANTED with respect to the jury award of $57,000 in response to Interrogatory One as to damages and otherwise DENIED.

3. The Motion of defendants for a New Trial is GRANTED as to damages only.

4. A pre-trial/status conference will be held on July 17, 1981 at 1:00 p.m. to consider preparation of a case stated on liability and any other further proceedings, including a special listing for trial, provided the Court of Appeals does not grant the pending motion to revoke the limited remand.

BY THE COURT:

/s/ Norma L. Shapiro
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	No. 74-122

ORDER

AND NOW, this 15th day of July, 1981, upon Order of the Court of Appeals for the Third Circuit entered July 8, 1981, it is ORDERED that:

The judgment in the sum of $5,445,000 entered August 22, 1979 in favor of Columbia Metal Culvert Company, Inc. and against Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc. is hereby VACATED.

BY THE COURT:

/s/ Norma L. Shapiro
J.

bcc: Robert L. Price, Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINIUM & CHEMICAL CORP. AND KAISER ALUMINIUM & CHEMICAL SALES, INC.	:	NO. 74-122

PLAINTIFFS' PRE-TRIAL STATEMENT RE: DAMAGES
DATED: SEPTEMBER 8, 1981

* * *

C. *Damages—Concept*

The concept behind Plaintiffs' damages evidence has been to estimate, from data available, and drawing conclusions from the data, the profits Columbia would have made without Kaiser's illegal acts, from June 1, 1973 through May 31, 1977; and to then calculate the value the business would have had as a going concern without Kaiser's illegal acts, as of May 31, 1977, deducting the amount received for the tangible assets. This is the same theory of damage which the Court held proper in its opinion dated June 17, 1981.

* * *

G. *Time Period For The Computation of Damages*

The basic analysis is to estimate what Columbia lost as a result of Kaiser's illegal actions. The beginning of the damage period has been described in the testimony as June 1, 1973, the beginning of Columbia's fiscal year. (N.T. 3865-66) The damages in this case are the profits Columbia lost up to May 31, 1977, (N.T. 3858), and then how much the value of Columbia as a going concern had been diminished as a consequence of Kaiser's illegal actions, as of May 31, 1977.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR and BARBARA CLISBY,	:	CIVIL ACTION
vs.	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

Philadelphia, Pennsylvania
November 30, 1981

BEFORE: HONORABLE NORMA L. SHAPIRO, J.

APPEARANCES:

DUANE, MORRIS & HECKSCHER
BY: MICHAEL M. BAYLSON, ESQ.,
for Plaintiffs.

BLANK, ROME, COMISKY & McCAULEY
BY: RICHARD P. McELROY, ESQ., and
ALEXANDER D. BONO, ESQ.,
for Defendants.

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* * *

MR. BAYLSON: Your Honor, I just think it would be very unfair to divide these into two time periods. There is no testimony. Mr. Draper said that they couldn't have continued in business past '75, but he said specifically he wasn't asked to calculate damages. He was only doing a calculation of what lost profits would have been. Then Dr. DiPodwin came in and said this was a proper period.

THE COURT: Let me ask you, I am not trying to resolve it now because I have to see these people and give you a choice whether you want to come in early tomorrow morning or talk to me later this evening. I am willing to com ein early tomorrow morning if you would prefer or stay, but I have an awful lot of lawyers waiting that I would like to see. The concern that I have is maybe dealt with—you are talking about not dividing years in any of these questions.

MR. BAYLSON: Right.

THE COURT: Is to be able to mold the verdict to avoid duplication. That is my concern, and it does seem to me, and maybe I could do it by instructing the jury, but if they find that the business should have closed in '75, for example, and they award the damages as a going concern in '75 it seems to me, Mr. McElroy, without agreeing you can there was evidence from which they could find the value as a going concern in '75.

MR. McELROY: Well, I don't know that there is.

MR. BAYLSON: Your Honor, another reason this is very unfair. We had all these pretrial statements, experts who computed damages on the same four-year fiscal period. Dr. DiPodwin. It is very unfair after the evidence comes in that they propose interrogatories dividing it.

THE COURT: All right. You're ahead of the game right now. You are persuasive.

MR. BAYLSON: I will stop.

THE COURT: Let me make my point. I will tell you that Mr. McElroy's way of putting it has a surface appeal to me, and bearing in mind how unfair you consider it I have given some thought that in itself it is not entirely persuasive. I assume what one of your proposes the other will object to, but what I have to

do is avoid duplication of damages. Now, if the jury buys Mr. McElroy's argument that they should have closed in '75 and gives a going concern value as of '75 there would be duplication if they also found lost profits from '75 to '77, and actual losses. When do the actual losses stop?

MR. BAYLSON: The actual losses are up to '77 too.

MR. McELROY: They never did.

THE COURT: In other words, it is clear to me that you are entitled to loss of profits projected until the time the plaintiff goes out of business, but when the plant goes out of business you are entitled to its going concern then. You are not entitled to both loss of profits and going concern value for the same period.

MR. BAYLSON: I agree.

THE COURT: We are all agreed on that. So, the question for me is how do I convey that concept to the jury. Your answer is easy. You say don't let them con..der that the business should have closed before '77.

MR. BAYLSON: No, that is not.

THE COURT: If it should have closed before '77 then I have to tell them that because of loss of profits, actual losses, you determined the going concern value at an earlier time.

MR. BAYLSON: If your Honor gives some instructions on the loss that are proper which I am sure you will, then they are going to find accordingly.

MR. McELROY: But they are going to be looking at an interrogatory that says '74 to '77. That's the problem.

THE COURT: What I did was just eliminate the date.

MR. McELROY: That might do it.

THE COURT: And say as of the time that you determine.

MR. McELROY: Yes. It isn't a question in my mind of when they should have gone out of business. The is when they did go out of business, May 31, 1975. You measure at the termination of the business, that is May 31, 1975. All adding those two years does is add approximately $500,000 to $600,000 worth of losses by keeping the doors open.

THE COURT: Is it your point that the value of the business in 1975 was the same as its value in '77, was the same as a going concern?

MR. McELROY: No, I would presume it is less because the project profits were less.

MR. BAYLSON: No, I am not sure. It may be more.

THE COURT: Because they haven't suffered all the losses. The actual value. If that business had been sold to Howmet in '75 instead of '77 based not on projected losses or what would have happened but what actually did happen could a jury—it isn't what we think. Could a jury reasonably find it could have had a higher value.

MR. BAYLSON: Sure, because its operating history before that would have been better. I think the damages projections were higher. The major point is it is confusing the jury because in the context of all the pretrial statements and what Dr. DePodwin himself said now they are being asked to divide this four-year period in half, and it is going to make me look stupid or the plaintiffs look stupid. We are talking about four years and the charge says we have to divide it in half.

THE COURT: You would have had subtotals on your charts.

MR. BAYLSON: At the minimum, and have Dr. DePodwin make computations. They made their statements on the four-year period and their experts give predictions on the four-year period, and my experts, and then come in and ask for interrogatories dividing it in half. It is confusing and an unfair state of affairs.

MR. McELROY: I don't know of anything that requires the defendant to agree with his damage period. And I don't.

THE COURT: No, but the interrogatories have to fairly address the issues at trial, and what I have been trying to do is to get these interrogatories in such a form that I could mold the verdict, but I can't allow my efforts to do that to get so specific that makes the trial unfair.

MR. McELROY: If your Honor feels that Mr. Baylson makes a point that now having two sets of questions as to two different periods of time is unfair I think it is actually unfair to us to say that there is one period '74 to '77 and maybe some balance can be struck by eliminating the dates.

THE COURT: That's what I am thinking of doing exactly.

MR. McELROY: And we are free to argue whatever we want to.

THE COURT: Yes, and they are. Now, is it your pleasure to come back later tonight or early tomorrow morning?

Off the record.

(Discussion off the record.)

(Concluded in Chambers.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

Philadelphia, Pennsylvania
December 1, 1981

BEFORE: HONORABLE NORMA L. SHAPIRO, J.
(and a jury of eight)

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* * *

First, plaintiffs are seeking the actual losses that Columbia incurred while it was still doing business.

Second, the plaintiffs are seeking lost profits that they project Columbia would have made from the sale of culvert pipe if the antitrust laws had not been violated.

* * *

With regard to the actual losses Columbia is claiming profits lost during its fiscal years 1974 through 1977 in this category. I am referring here to losses actually and reasonably sustained as a result of Kaiser's violation of the antitrust laws.

* * *

You are not to presume just because Columbia suffered financial losses or went out of business that all such losses are

caused by Kaiser. The plaintiff, as I said, must prove those financial losses are setbacks that were caused by Kaiser and establish some reasonable basis in the evidence for the damages that you find.

Similarly it follows from that that you should not award plaintiffs damages for losses caused not by Kaiser but by conditions in the economy in general or a recession in the construction industry, aluminum shortage, a lack of price protection for long-term requirement contracts.

* * *

Columbia's damage computations are based on the contention that Columbia suffered injury until the close of its 1977 fiscal, May 31, 1977.

Kaiser contends that Columbia was in effect out of business by 1975 and should have been terminated by then, indeed called attention to the fact that this lawsuit began in 1974 and contends that the actual losses after that date would not have been reasonably suffered, and that Columbia's projected loss of profits thereafter are not valid. So, it contends that the value of the loss of the business as a going concern, if any, should properly be determined as of that date in 1975.

Columbia contends that its business was effectively terminated in June 1977 when it would have been forced to cease operations and close its doors but for the government loan it received.

If you find this is reasonable based on the evidence you may award an amount based on loss of profits until May 31, 1977 and value of the business as a going concern as of that date, but if you find that the plaintiffs failed to close down or liquidate Columbia when it was reasonable to do so under the circumstances shown by the evidence then you should reduce the amount of their damages by the amount that you believe was sustained after the point in time when Columbia should have closed down. For example, if you find it was not reasonable for Columbia to have continued in business and to have sustained losses after a certain date then you can't award damage for lost profits beyond then.

Likewise if you find that it was unreasonable for Columbia to continue in business beyond a certain date and you award

damages for the loss of value, the going concern value of the business, you should calculate that going concern value as of the date you believe it was reasonable for Columbia to have ceased operations.

The important thing is that you make every effort and you do not duplicate the damages under each of these various elements the plaintiff is entitled if you feel that the plaintiff met its burden as to each of these elements but not to a duplication. Each one of them once.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR., and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

Philadelphia, Pennsylvania
December 2, 1981

BEFORE: HONORABLE NORMA L. SHAPIRO, J.
(and a jury of eight)

APPEARANCES:

DUANE, MORRIS & HECKSCHER
BY: MICHAEL M. BAYLSON, ESQ.,
for Plaintiffs.

BLANK, ROME, COMISKY & McCAULEY
BY: RICHARD P. McELROY, ESQ., and
ALEXANDER D. BONO, ESQ.,
for Defendants.

(In court 9:30 a.m.)

THE COURT: Good morning.

Off the record.

(Discussion off the record.)

THE COURT: Will you bring the jury in, please.

(Jury present 9:41 a.m.)

THE COURT: Good morning. This is the kind of morning when you don't mind being here inside, and if your deliberations should continue during the day the government will provide you with lunch, and your order will be taken in mid-morning so that it can come to you on time.

I told you yesterday when you left that you must not discuss this matter with your family or friends, and because you are a deliberating jury and it was so important that when you returned this morning I would ask each of you whether you have refrained from reading about this in the newspapers listening to anything about it on the radio, learning anything about the case on television, and whether you have also refrained from discussing it with your family and friends in accordance with my instructions. Rather than repeat that question to each of you you will understand that this same question is addressed to each of you, and I will ask for your individual responses.

Mr. Davidson, have you followed the instructions of the Court? Have you refrained from discussing this with your family and your friends.

JUROR NO. 1: No.

THE COURT: No you have not refrained, or no you have not discussed it?

JUROR NO. 1: I have not.

THE COURT: Discussed it.

JUROR NO. 1: That's right.

THE COURT: And you haven't learned anything about it outside the courtroom on the radio or T.V. have you?

JUROR NO. 1: Right.

THE COURT: Mr. Masanti, have you refrained from discussing this matter with your family and friends?

JUROR NO. 2: Yes.

THE COURT: Have you learned anything about it outside the courtroom?

JUROR NO. 2: No.

THE COURT: Mr. Napp, have you discussed this with your family or friends or anyone else than the jurors in the jury room?

JUROR NO. 3: No, I have not.

THE COURT: Have you heard anything about it outside the courtroom?

JUROR NO. 3: No.

THE COURT: Mr. Thourson, have you refrained from discussing this with anyone?

JUROR NO. 4: Yes, I have.

THE COURT: Have you heard anything about it outside the courtroom?

JUROR NO. 4: No.

THE COURT: Ms. McPharlan, have you followed the instructions of the Court and refrained from discussing it?

JUROR NO. 5: I did, your Honor.

THE COURT: Have you heard anything about it outside the courtroom?

JUROR NO. 5: No.

THE COURT: Mr. Majasky, have you refrained from discussing the matter?

JUROR NO. 6: Yes, I have.

THE COURT: Have you heard anything about it outside the courtroom?

JUROR NO. 6: No.

THE COURT: Mr. Woodington, have you refrained from discussing this with anyone since you left here yesterday?

JUROR NO. 7: Yes, I have.

THE COURT: Have you heard anything about it outside the courtroom?

JUROR NO. 7: No, ma'am, I have not.

THE COURT: Ms. Fitz, have you refrained from discussing with persons other than the jurors and not discussed it since you left yesterday?

JUROR NO. 8: Yes.

THE COURT: Have you heard anything about the matter outside the courtroom?

JUROR NO. 8: No.

THE COURT: Thank you. With that I will send you back to the jury room to resume your deliberations, and my deputy, Ms. Starr, will continue to be your contact if there is any problem. Thank you. Good morning.

(Jury out to resume deliberations 9:46 a.m.)

(In court 2:23 p.m.)

THE COURT: Will you bring in the jury, please.

(Jury present 2:24 p.m.)

THE COURT: Good afternoon, ladies and gentlemen. Who is the foreperson that you have selected.

JUROR NO. 7: I am, your Honor.

THE COURT: All right.

Ladies and gentlemen, I have been advised that you have reached a verdict. Is that correct?

(General affirmative response by the jurors.)

THE COURT: Now I will ask the foreperson to answer the questions that I address to you, and I ask you to listen carefully because at the conclusion of his responses I will then ask each of you if that is also the verdict of each of you as to each and every question that is asked.

Mr. Woodington, in what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused actual losses to Columbia?

JUROR NO. 7: $728,000.

THE COURT: In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused lost profits (exclusive of actual losses) to Columbia on the sale of aluminum culvert pipe?

JUROR NO. 7: $742,520.

THE COURT: In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused to

Columbia lost profits (exclusive of actual losses) on the sale of flat corrugated aluminum sheet?

JUROR NO. 7: $80,000.

THE COURT: In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused damage to Columbia for the diminution in value of its business?

JUROR NO. 7: $1,638,793.

THE COURT: Thank you.

Ladies and gentlemen, you have heard the verdict and I will ask each of you if that is your response to each question as well.

Mr. Davidson.

JUROR NO. 1: Yes, it is.

THE COURT: On all the questions?

JUROR NO. 1: What was that?

THE COURT: Was that the verdict of yours as well as the jury? Do you agree that is what you decide?

JUROR NO. 1: Yes.

THE COURT: As to each question?

JUROR NO. 1: No.

THE COURT: Which question was not your answer?

JUROR NO. 1: I didn't get you.

THE COURT: Was that your answer to question 1?

JUROR NO. 1: Oh, yes.

THE COURT: Was that your answer to question 2?

JUROR NO. 1: Yes.

THE COURT: Was that your answer to question 3?

JUROR NO. 1: Yes, ma'am.

THE COURT: And was that your answer to question 4?

JUROR NO. 1: Yes, ma'am.

THE COURT: Mr. Masanti, was that your response to all the questions?

JUROR NO. 2: Yes.

THE COURT: Mr. Napp, was that your answer to all the questions?

JUROR NO. 3: Yes, it was, your Honor.

THE COURT: Mr. Thourson, was that your answer to all the questions?

JUROR NO. 4: That's right.

THE COURT: Ms. McPharlan, was that your answer to all the questions?

JUROR NO. 5: Yes.

THE COURT: Mr. Majasky, was that your answer?

JUROR NO. 6: Yes, your Honor.

THE COURT: Mr. Woodington, was that your answer as well as the jury's?

JUROR NO. 7: Yes.

THE COURT: And Ms. Fitz, was that your answer?

JUROR NO. 8: Definitely, your Honor.

THE COURT: Thank you very much, and I want to thank you for the time and effort that you have spent in addressing yourselves to the issues and to the evidence presented which was sometimes technical and not always easy to understand, and with that I want to excuse you and wish you a good day. Your service as jurors has been concluded, but you are entitled to a certificate of thanks for your service and they will tell you down in the jury office how you obtain that and any further instructions that you have to get.

Thank you and good afternoon.

You may not keep your notes. You will leave them with my deputy, please, and leave the original verdict form, please.

(Jury excused.)

MR. BAYLSON: Your Honor, I would ask that the verdict be recorded and judgment entered trebled the amount of the verdict.

THE COURT: The verdict will be recorded as it was in the presence of the jurors, and I will enter the judgment later. I have to do the arithmetic. I will issue an order today requiring post trial motions within ten days, and as we agreed yesterday that within 14 days of the filing of the post trial motions the moving party will serve and file a memorandum of law in support of the post trial motion or motions. A memorandum of law in opposition must be served and filed within ten days thereafter. I will hold oral argument on Friday, January 29 at 9:00 o'clock.

Thank you. That concludes the proceedings in this case. Thank you all very much.

MR. McELROY: No, it doesn't.

THE COURT: That concludes them for the time being. We will recess.

(Concluded at 2:30 p.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

INTERROGATORIES TO THE JURY

1. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused actual losses to Columbia?	None ___	$ 728,000
2. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused lost profits (exclusive of actual losses) to Columbia on the sale of aluminum culvert pipe?	None ___	$ 742,520
3. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused to Columbia lost profits (exclusive of actual losses) on the sale of flat corrugated aluminum sheet?	None ___	$ 80,000
4. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused damage to Columbia for the diminution in value of its business?	None ___	$1,638,793

/s/ _____
Foreperson

Date: 12/2/81

PLEASE NOTIFY THE MARSHAL
WHEN DELIBERATIONS HAVE BEEN COMPLETED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISKY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
vs.	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

CIVIL JUDGMENT

Before Honorable Norma L. Shapiro

AND NOW, this 2nd day of December 1981, in accordance with the Jury's answers to interrogatories and the direction of the Court that the verdict be trebled according to law.

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the Plaintiffs Joseph A. Bonjorno, George M. Kerr, Jr. and Barbara K. Clisby, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc. and against the Defendants Kaiser Aluminum and Chem. Corp. & Kaiser Aluminum & Chem. Sales, Inc. in the sum of NINE MILLION, FIVE HUNDRED SIXTY-SEVEN THOUSAND, NINE HUNDRED AND THIRTY-NINE ($9,567,939.00) DOLLARS.

BY THE COURT: Norma L. Shapiro

ATTEST: Norma L. Shapiro, J.

Civ 1 (8/80)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

MEMORANDUM and ORDER

NORMA L. SHAPIRO, J. JANUARY 17, 1983

INTRODUCTION

Before the court are post-trial motions arising out of a retrial on damages only in this antitrust litigation. Following the entry of judgment for plaintiffs on the jury's answers to four special interrogatories in the trebled amount of $9,567,939, defendants Kaiser Aluminum & Chemical Corp. ("KACC") and Kaiser Aluminum & Chemical Sales, Inc. ("KACSI") moved for a judgment notwithstanding the verdict or, in the alternative, for a new trial on both liability and damages.

Plaintiff Columbia Metal Culvert Co., Inc. ("Columbia"), a liquidated corporation (interest in this litigation has been assigned to the present plaintiffs, its former shareholders), originally brought an action against KACC and KACSI, former Columbia salesman Robert A. Kennedy and his company, Kennedy Culvert and Supply, in which it alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and Section 3 of the Clayton Act, 15 U.S.C. §14. A detailed description of the specific actions complained of and the procedural history of this case is contained in the Memorandum

accompanying the Order of June 17, 1981 published at 518 F. Supp. 102 (E.D.Pa. 1981).

At the first trial before The Hon. Edward N. Cahn, judgment in favor of defendants was entered on defendants' motion for a directed verdict at the close of Columbia's evidence on the grounds that Columbia, formerly a manufacturer and distributor of aluminum culvert pipe, had not established a *prima facie* case of conspiracy in restraint of trade between KACC and KACSI or between either and Kennedy, proved that Kaiser had monopoly power in the relevant product market, or established a *prima facie* violation of Section 3 of the Clayton Act. The Third Circuit affirmed the grant of a directed verdict as to Kennedy but reversed as to KACC and KACSI, except on the Clayton Act count. Sufficient evidence was presented to allow a jury to decide the relevant product market, whether KACC/KACSI had monopolized or attempted to monopolize that market, and whether KACC and KACSI conspired in violation of Sections 1 and 2 of the Sherman Act.

On remand and transfer to the docket of this court, there was a bifurcated trial by jury. The jury found on answers to special interrogatories that the relevant product market was aluminum culvert and draingage pipe, that KACC and KACSI had monopolized and attempted to monopolize the relevant product market, that KACC and KACSI had conspired in violation of Sections 1 and 2 of the Sherman Act, and that Columbia had been injured by the unlawful acts of KACC and KACSI. Damages awarded in the amount of $1,815,000 were trebled and judgment entered in favor of plaintiffs for $5,445,000. Following a direct appeal (because defendants post-trial motions were untimely filed), the case was remanded to this court by the Court of Appeals for disposition of Kaiser's motions for a judgment notwithstanding the veredict or in the alternative for a new trial.

We denied Kaiser's motions for judgment notwithstanding the verdict or a new trial as to liability because the evidence at retrial was not substantially different from that previously held adequate by the Court of Appeals; the jury's determination was not so against the weight of the evidence as to shock the

conscience of the court. 518 F. Supp. at 102. However, judgment notwithstanding the verdict was granted as to the first interrogatory on damages (awarding defendants $57,000 for Columbia's increased usage of aluminum coil in 1971-73). *Id.* at 114. A new trial was granted on the second and third interrogatories, awarding $1,048,000 in losts profits from 1973 to May 31, 1977 and $710,000 for loss of going concern value thereafter.

Plaintiffs had presented only two damages witnesses, plaintiff Bonjorno himself and an expert, Dr. Alfred Kuehn. The record was found insufficient to establish the requisite factual basis to allow the jury to make a rational determination of the accuracy of Bonjorno's testimony. *Id.* at 115. Dr. Kuehn's testimony was found confused and confusing. "The total effect is that of a witness who did not know what he was talking about; therefore, the jury could only rely upon charts and figures, the factual basis for which had not been adequately established or explained." *Id.* at 118. In sum, plaintiffs' evidence created a speculative verdict on damages. *Id.* at 117. Because the damages and liability issues were not inextricably interwoven, and there was no indication that the jury verdict was the result of compromise on the liability and damage questions, retrial on damages only was ordered. *Id.* at 119.

The parties were requested to state their positions on procedure for a fair retrial on damages. Defendants had conceded at the argument on post-trial motions following the first trial that the court had the power to retry on damages only, but after the new trial on damages was granted, defendants argued that it would violate their constitutional right to trial by jury. However, counsel for defendants actively participated in discussions on the damage trial procedure.

At the outset of the damage trial, the court informed the jury of their duties. Because a jury in an antitrust matter must award only those damages that flow from the antitrust injury, *see,* 518 F. Supp. at 109, the opening statement was designed to acquaint the jurors with the nature of the antitrust violations that had been found. The jurors were told the parties, the businesses they were or are engaged in, the product and geographic markets involved, the antitrust laws the prior jury had found

violated, the purpose of those laws, and the types of liability evidence presented at the prior trial. Finally, the liability interrogatories and answers of the prior jury (518 F. Supp. at 119, App. A) were read to the damage jury. (N.T. 20-25).

Upon the conclusion of this opening statement, counsel for plaintiffs made opening remarks not only on the evidence to be presented by plaintiffs during the retrial but also the liability evidence that had been presented during the prior trial. To provide the jury with an understanding of the activities that gave rise to liability, plaintiffs' counsel was permitted to list the types of activities by KACC and KACSI relied on by plaintiff to establish liability at the first trial: that defendants refused to sell raw materials to Columbia; located a new culvert manufacturing plant within forty miles of Columbia's plant to retaliate against Columbia for buying materials from another supplier; set up Kennedy, the former Columbia salesman, to compete with Columbia; instituted a "price squeeze," in which Kaiser raised the price of the aluminum needed to fabricate culvert but sold fabricated culvert at a constant price; and induced Columbia to buy a machine suitable for use only with Kaiser products unless modified at significant expense. (N.T. 32-41). Counsel for defendants responded to plaintiffs' statement on liability in his opening remarks. (N.T. 53-56).

The jury, answering four special interrogatories on damages (attached hereto as Appendix A), awarded plaintiffs $728,000 for actual losses, $742,520 for lost profits on the sale of aluminum culvert pipe, $80,000 for lost profits on the sale of flat corrugated aluminum sheet, and $1,638,793 for the diminution in the value of the business. Judgment in the trebled amount of $9,567,939 was entered on this special verdict. Kaiser defendants have again filed post-trial motions. Judgment notwithstanding the verdict is sought on the grounds that: the retrial on damages was improper because the jury was unable to award damages flowing only from the antitrust injury; damages awarded for lost profits duplicated damages for actual losses (Int. 2); the profit projections were unsupported by evidence and artificially enhanced by plaintiffs' use of an improper geographic area and understatement of certain expenses; and the plaintiffs' contentions in the

trial on damages contradicted their contentions on the price squeeze in the trial on liability. Defendants also contest the period for which an award of damages on actual losses and lost profits was permitted. Defendants claim that damages awarded for lost profits from the intended sale of flat corrugated sheet (Int. 3) were speculative. Defendants claim also that allowing damages for loss of the value of a going concern (Int. 4) was improper because Columbia did not prove it ever actually terminated business during the damage period. Defendants contend that in any event the damage for loss of going concern value was overstated and was based on assumptions not supported by the evidence.

Defendants move in the alternative for a new trial on the grounds that the retrial on damages only was improper and prejudicial; the conduct of plaintiff's counsel was inflammatory; the court erred in its evidentiary rulings, charge and form of special verdict; and finally that the amount of the verdict was grossly excessive, shocking to the conscience, and the product of jury bias against defendants. Defendants' alternative motion for a new trial on damages only is denied. Defendants' motion for judgment notwithstanding the verdict is denied with regard to damages awarded in response to Interrogatories 1, 2 and 3 and granted as to damages awarded in response to Interrogatory 4. As a result, the jury's award is reduced by $1,638,793 (Int. 4) and the award remaining is in the total amount of $1,550,520. Therefore, when trebled, plaintiffs are entitled to entry of judgment in the amount of $4,651,560.

RETRIAL ON DAMAGES ONLY

KACC and KACSI (hereinafter referred to collectively as "Kaiser") object to the retrial on damages only ordered by the court on June 13, 1981 upon granting in part its motion for new trial. Kaiser contends that becuase it did not hear the evidence on liability, the damage jury was unable to determine which, if any, of the losses that Columbia suffered were actually caused by the antitrust violation. That such causation was required is clear. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477,

489 (1977) ("Plaintiffs must prove *antitrust* injury, which is to say injury of the type . . . that flows from that which makes defendants' acts unlawful . . .". However, the retrial procedure utilized did not in and of itself preclude rational jury determination of damages caused by the antitrust violations found by the previous jury.[1]

> The Third Circuit has expressly approved the use of a retrial on antitrust damages in *Pitchford v. PEPI, Inc.*, 531 F.2d 92 (3d Cir. 1975), *cert. denied*, 426 U.S. 935 (1976); other cases in the Third Circuit are collected in plaintiffs' brief at Appendix C.[2] In that case the Court of Appeals found legal error in plaintiff's calculations of damages and remanded to the district court for a new trial on damages only. 531 F.2d at 107-09. We cannot presume that the Court of Appeals ordered a procedure that was *per se* violative of the rights of antitrust defendants. *Pueblo, supra* was decided after *Pitchford, supra*, but it was not the first case to hold that damages must be caused by defendant's antitrust violations and it may be assumed that the Court of Appeals was cognizant of a causation requirement when *Pitchford* was decided. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), for example, decided years before the remand for a damage trial in *Pitchford*, referred explicitly to the "necessary causal relation between the [violator's] conduct and the claimed damages. . . ." *Zenith, supra* at 125.

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1. In his opening statement, Kaiser's counsel "assured" the jury that Kaiser did not violate the antitrust laws or "any other law" notwithstanding the prior jury's determination of liability. (N.T. 52). Kaiser continues to object to the prior jury's determination of liability. Indeed, Kaiser seemed to protest the very mention of the previous liability verdict to the damage jury. (Defendants' Brief at 22). Of course, informing the damage jury of the prior determination of liability was a necessary first step in a retrial on damages to ensure that the damages, if any were found, flow from the antitrust violations. The court made strenuous, although not altogether successful, efforts to limit reference to the issues resolved at the liability phase to the bare minimum required for the jury to understand and determine the damage issues. (Defendants' Brief, 18-60; Plaintiffs' Brief, 26-54).

2. It has only recently been reported that the Court of Appeals for the Seventh Circuit has awarded a new trial on damages only in the MCI-AT&T antitrust litigation. *Philadelphia Inquirer*, January 13, 1983.

Defendants never requested that special interrogatories as to the alleged anticompetitive acts complained of by plaintiffs be submitted to the liability jury. (Defendants' Brief at 14-15, 23-24). Kaiser claims that the damage jury could not know which of the five alleged anticompetitive practices complained of by plaintiffs were actually relied upon by the jury that found it liable. But plaintiffs' economist did not attempt to and did not have to distinguish between actual losses caused by the various types of anticompetitive practices. Whether plaintiffs' losses were caused by one or more of the anticompetitive acts was immaterial on the damages issue so long as the jury was presented with competent evidence to prove the extent of plaintiffs' losses caused by Kaiser's impairment of the free and open market in aluminum culvert pipe. Plaintiffs' evidence was so directed. (*See, e.g.*, N.T. 509, 542, 548, 596). The charge to the jury made clear that the jury could only award damages for injury caused by Kaiser's conduct in the market:

> You are not to presume just because Columbia suffered financial losses or went out of business that all such losses are caused by Kaiser. The plaintiff, as I said, must prove those financial losses are setbacks that were caused by Kaiser and establish some reasonable basis in the evidence for the damages that you find.
>
> Similarly it follows from that that you should not award plaintiffs damages for losses caused not by Kaiser but by conditions in the economy in general or a recession in the construction industry, aluminum, shortage, a lack of price protection for long-term requirement contracts.
>
> You may also consider whether or not plaintiffs' calculations should have taken into account poor business judgment or poor management. Some corporations suffer losses solely because of their own inadequate financial capitalization. You can't award plaintiffs damages for all its losses if you find that Columbia was under capitalized, that is that there was a lack of sufficient working capital and that losses were suffered as a result of that, because under such

circumstances Columbia's financial inadequacies rather than Kaiser's conduct would have caused some portion of the losses.

(N.T. 1531-32).

Even if there were a serious question raised as to the propriety of a new trial on damages only, defendants waived objection to this procedure. Before issuing the June 17, 1981 Order granting the retrial, defendants spoke in favor of the concept. Addressing the court's question during supplemental oral argument on the post-trial motions on December 29, 1980, counsel for Kaiser stated:

> . . . with respect to the grant of a new trial with respect to damages alone, obviously, in our submission, the cases would support that kind of remedy.
>
> As to the mechanics upon the new trial, it seems to me, Your Honor, that there would, of necessity, simply be more to the trial than a review of the charts, testimony of Dr. Kuehn, or whomever the plaintiff wished to put on as a fact witness or expert witness. It seems to me there are additional matters relevant to damages and the amount of damages which also go to questions of causation. Those as we have addressed in our post-trial briefs, deal with conditions in the marketplace that may have impacted upon Columbia's volume of sales, and hence on the amount of profit that it would have earned even assuming the existence of violations of the antitrust laws by Kaiser which also impacted upon Columbia . . . .
>
> With respect to liability, I believe that it would be sufficient to inform the jury that a verdict on liability has been established; that a jury has found that that violation of the antitrust laws caused some damage to Columbia, and it would be up to the jury to determine what the extent and amount of that damage was, and I believe that a trial could occur.

Docket Entry No. 510, N.T. 406. Defendants, having supported a new trial on damages before the jury's award at such trial was

known, should not be permitted to object to the procedure itself just because its outcome is not to their liking.

But even if defendants are correct that a limited retrial on the issue of the amount of damages was so prejudicial to Kaiser as to constitute reversible error, the remedy can certainly not be a judgment notwithstanding the verdict in favor of defendants; at most defendants are entitled to a retrial on both liability and damages. That remedy does not lie with this court at this time. Following a bifurcated trial on liability and damages on remand from the Court of Appeals, this court denied a motion for a judgment notwithstanding the verdict on liability; judgment notwithstanding the verdict was granted as to one item of damage in the amount of $157,000 and a new trial granted as to the award of damages for lost profits ($1,048,000) and destruction of Columbia as a going concern ($710,000). But, that new trial was as to damages only for the reasons stated in the court's Opinion of June 18, 1981. At this juncture, the power of this court is limited to granting a new trial again on damages only. This was called to the attention of counsel frequently in the course of the trial in trying to assure fair procedures and prevent yet another retrial. (N.T. 97-99; 976-978). Therefore, the court concludes that defendants' objections to a limited retrial on damages are only to preserve them for the Court of Appeals which, of course, has the power to order a new trial on liability and/or damages.

JUDGMENT NOTWITHSTANDING THE VERDICT

The standard in this Circuit for the entry of judgment notwithstanding the verdict is clear. The court must interpret the evidence in the light most favorable to the verdict winner, and may grant the motion only if that evidence and the reasonable inferences to be drawn therefrom fail to support the verdict as a matter of law. *Neville Chemical Co. v. Union Carbide Corp.*, 422 F.2d 1205, 1210 (3d Cir.), *cert. denied*, 400 U.S. 826 (1970). *See also, Hahn v. Atlantic Richfield Co.*, 625 F.2d 1095, 1098-99 (3d Cir. 1980), *cert. denied*, 450 U.S. 981 (1981); *Kademenos v. Equitable Life Assurance Society*, 513

F.2d 1073, 1974 (3d Cir. 1975); 6A *Moore's Federal Practice* §59.08[5] at 59-152 (1979). A directed verdict may be entered on only one or a combination of jury findings if a special verdict has been returned in accordance with Fed.R.Civ.P. 49(a). *See, Franklin Music Co. v. American Broadcasting Cos., Inc., et al,* 616 F.2d 528 (3d Cir. 1979); *Fox v. Kane-Miller Corp.,* 398 F. Supp. 609, 649 (D.Md. 1975), *aff'd,* 542 F.2d 915 (4th Cir. 1976).

Defendants concede this standard but contend that the court should enter judgment n.o.v. because the verdict is contrary to the evidence and unsupported in the record; that is, there is but one reasonable conclusion as to the proper judgment. Defendants agrue this persuasively and well. Defendants' brief makes an excellent closing speech to the jury; the problem is that the jury heard it and nonetheless decided for plaintiffs. With the exception of damages for loss of value of a going concern discussed below, there is no error of law during the trial or in the court's charge to the jury on damages (N.T. 554) that would justify setting aside that verdict. The charge was fair and clear although relatively brief because it commented little on the evidence argued in detail by able counsel for both sides. But it touched on and left to the jury all but one of the matters of which defendants now complain in asserting a right to judgment notwithstanding the verdict.

The Supreme Court stated in *Zenith, supra:*

> Trial and appellate courts alike must also observe the practical limits of the burden of proof, which may be demanded of a treble damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts.

395 U.S. at 123. Accordingly, in an antitrust case, damages need not be proven with exactness or precision; rather, "the wrongdoer shall bear the risk of uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures, Inc.,* 327 U.S. 251, 264 (1946). The court does not have the prerogative of drawing

inferences from facts within the exclusive province of the jury that are contrary to its findings without usurping the functions of the jury as a fact finding body. *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555, 566 (1931). It was for the jury to determine the weight of the evidence and the credit to be given the witnesses, expert or otherwise; it has given its verdict accordingly. To set this verdict aside except for clear error of law would impermissibly intrude on the role of the jury in an antitrust trial.

DUPLICATION OF ACTUAL LOSSES AND LOST PROFITS

Kaiser contends that the award for hypothetical lost profits (Int. 2) duplicates the award for actual losses (Int. 1). Kaiser argues that these two types of losses are "irreconcilably contradictory and mutually exclusive." (Defendants' Brief at 64). *See, William Goldman Theatres, Inc. v. Loew's, Inc.,* 69 F. Supp. 103, 105 (E.D.Pa. 1946) *aff'd,* 164 F.2d 1021 (3d Cir.), *cert. denied,* 334 U.S. 811 (1948). In *William Goldman Theatres,* the plaintiff was unable to obtain first-run movies for his leased theater because of defendants' conspiracy to restrain trade. 150 F.2d 738, 742 (3d Cir. 1945). The district court declined to award out-of-pocket expenses actually incurred by plaintiff in connection with an alternative use of the premises in addition to the lost profits from the hypothetical operation of the business from which plaintiff was excluded by defendant's conduct. 69 F. Supp. at 105. Plaintiff's actual losses from the ineffective effort to mitigate damages were not causally connected with the losses from the intended use for which antitrust damages were awarded. *See,* 69 F. Supp. at 105.

However, Columbia was in business throughout the damage period as a culvert fabricator and distributor. To the extent it would have made profits in a free and open market, the antitrust laws provide compensation. Columbia incurred actual losses while running the business it contended it would have operated profitably but for the illegal conduct of the defendants. Plaintiffs' damages would have been reduced had Columbia

actually made a profit during the damages period, and so plaintiffs may recover the net losses that were actually incurred in addition to the profits they would have made. Had Columbia made a profit, that sum would have been subtracted from hypothetical lost profits to arrive at the true measure of harm to Columbia. *Pitchford, supra* at 109. But plaintiffs suffered a loss rather than a profit and are entitled to subtract this negative figure from the hypothetical lost profits proved. *(See,* N.T. 55-56). The resulting calculation, the addition of actual losses to lost profits, is necessary to make plaintiffs whole.

LOST PROFITS ON ALUMINUM CULVERT PIPE

Plaintiffs utilized a market share theory to calculate their hypothetical lost profits during the damage period. Plaintiffs' expert economist, Dr. Gary Bowman, calculated the amount of aluminum culvert pipe actually sold in the relevant market and then calculated the proportion of sales Columbia would have made absent an antitrust violation. He sought to establish the number of pounds of culvert Columbia would have sold in a free and open market and multiplied that number by the estimated revenues Columbia would have received per pound. From this estimate of gross revenues he subtracted his estimate of Columbia's total expenses if there had been a free and open market. This type of analysis is proper in a case in which plaintiffs were deprived from competing freely in a particular product and geographic market, and the injured party need not produce the "kind of concrete, detailed proof of injury which is available in other contexts." *Zenith, supra* at 116, 123-35.

An expert opinion on relevant damages issues is not enought to satisfy the plaintiffs' burden on damages unless that opinion is based on relevant data and the assumptions behind the opinion are shown to be realistic so that the jury has a rational basis for its decision. *In re IBM Peripheral EDP Devices Antitrust Litigation,* 481 F. Supp. 965, 1012, 1020 (N.D.Calif. 1979). Plaintiffs presented expert testimony on all elements of the market share theory, their estimates of the size of the local market issue, Columbia's share of the local and non-local

markets assuming free and open competition, and Columbia's expenses in a free and open market; therefore, the record did not force the jury to engage in impermissible speculation.

Defendants argue that the jury's award of plaintiffs' claims for lost profits must be set aside because plaintiffs' projection of lost profits on the sale of aluminum culvert pipe is based upon assumptions unsupported and contradicted by the evidence in that:

a. the volume of sales in the so-called "local area" are deliberately overstated, contrary to the evidence in the record;

b. plaintiffs' proof on damages improperly deviated from the stipulated relevant geographic market; and

c. plaintiffs' projections of profits on the sale of aluminum culvert pipe were artifically and improperly enhanced by understating certain expenses.

The first step in estimating what a defunct business would have sold in a free and open market was to estimate the overall volume of the market. Plaintiffs' expert chose to use two geographic markets: local and non-local. The local, or "Vineland," selling market was the area covered by the approximately 150-mile radius surrounding Vineland, New Jersey, the location of Columbia's plant. The non-local market was the remainder of the geographic market for which plaintiffs seek damages. Plaintiff's stated rationale for using two markets was that Columbia would have commanded a significantly greater proportion of sales in the local rather than non-local area—50% rather than 30%.

Thus, if plaintiffs' estimate of the number of pounds sold in the local market was too high because it took into account pounds that were sold in the non-local market, the figure for the total number of pounds of pipe sold by Columbia would be inflated, since the local poundage is multiplied by .5 but the non-local by .3. It is plaintiffs' burden to put into evidence a reasonable and rational estimate of the size of the market. *Schwabe, Inc. v. United Shoe Machinery Corp.,* 297 F.2d 906,

911-12 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962). Where conflicts as to credibility exist as to ceratin estimates, they are to be resolved by the jury.

Defendant points out that Dr. Bowman used figures for the so-called "local market" that included non-local sales although Dr. Bowman asserted to the contrary. (N.T. 609). Under cross-examination, Dr. Bowman stated that he obtained his estimate of local market sales by adding sales from Kaiser's New Castle, Delaware plant to Columbia's Vineland sales, This approximately 150-mile local sales area included all of New Jersey, Delaware, most of Maryland, approximately the eastern third of Pennsylvania and very small portions of Virginia, West Virginia, and New York. Ex. D-150 (Map of Eastern United States with 150-mile radius of Vineland delineated). Kaiser introduced uncontradicted deposition testimony that New Castle sales include sales from the entire state of "Virginia, West Virginia, Maryland, Delaware, New Jersey, Pennsylvania." (N.T. 886), Dr. Bowman used an "adjusted territory pounds" figure and then assumed that included only sales within the local area (N.T. 610); Kaiser argues the invalidity of that assumption. Kaiser's evidence tends to establish that significant sales were made outside the local area that Dr. Bowman considered the local market; Dr. Bowman admitted that if such were the case, his figures would have to be adjusted. (N.T. 611). Kaiser argues that because the jury had no basis upon which to adjust Dr. Bowman's inflated figures, Dr. Bowman's opinion on the total pounds of culvert sold by Columbia permitted the jury to speculate as to the total size of the market.

But Dr. Bowman told the jury he divided the entire market into two shares basically for two reasons: Columbia would have made more sales in an area closer to its plant, and Kaiser data from its New Castle and Schenectady plants was available. The local market focused on Kaiser sales areas and was not strictly speaking an area within a 150-mile radius of Vineland, New Jersey as defendants contended. Since Kaiser was the dominant selling force in the total market, Kaiser sold most of the aluminum culvert pipe, and the Kaiser data provided a natural factual basis for the computation of the market. On plaintiffs'

proof of its damages from Kaiser's violation of antitrust laws, Kaiser does not have standing to complain about its data not providing a precise "geographical fit" to the relevant geographical market in this case.

Q. Why did you pick those two areas? Why did you make that division?

A. Generally speaking the reason for making any division if you divide an overall market area into subareas you get a somewhat more accurate projection. That is the share of the market Columbia would have had in the near areas is bigger than it would have had in the further away area. The reason I chose those two areas is that that is the way Kaiser's statistics were broken down. It was convenient. They had figures for sales to what they called the New Castle area, and they had sales outside of that that I called sort of loosely the non-local area which also may be called the Schenectady area. Since I couldn't breakdown Kaiser's figures any other way and I had Mr. Bonjorno available to tell me how his sales broke down between the two areas as defined by Kaiser it was convenient to use those two breakdowns rather than a breakdown of the overall market into two submarkets.

Q. Once you had decided to make that breakdown, what was the first thing you then did with the data you had available?

A. Once I had the breakdown I wanted to see what kind of market share each of the companies would have had, specifically what market share Columbia would have had over the period '74 through '77.

Q. Did you attempt to determine what volume had actually been sold in each of those areas?

A. Yes, I did. I described that earlier. I'm sorry, that is clearly the first step. You have to know how much was sold in each of the areas over the period.

(N.T. 305-6, Dr. Bowman).

Plaintiffs contend that, even if their estimate of total pounds sold in the local market was inflated by overstatement of the size of the market, Kaiser could have introduced its own data demonstrating the size of the local market. (Plaintiffs' Brief at 69). Defendants chose instead to attack the credibility of plaintiffs' evidence at trial and its adequacy post trial. But once the jury has determined the credibility issues adversely to defendants only the issue of adequacy remains and the standard of proving damages is liberal. *Bigelow, supra.* That standard has been met if plaintiffs' expert is to be believed.

To determine the number of pounds of aluminum culvert pipe Columbia would have sold absent Kaiser's antitrust violations, Dr. Bowman multiplied the total poundage that would have been sold by all companies by his estimate of Columbia's share of the local and non-local markets. If that estimate had no basis in fact, the resulting calculation had no basis in fact and the jury in considering it would have been speculating in arriving at its verdict on lost profits.

Dr. Bowman determined that in a free and open market Columbia would have almost only Kaiser as a competitor and that Columbia would have obtained 50% of the sales in the local market and 30% of the sales beyond the local market.

> Q. Now, why did you select fifty per cent—well, for the three years '75, '76 and '77, why did you use that specific figure [for the local area]?
>
> A. Basically because there were two competitors in the marketplace. Basically was Kaiser and Columbia, and basically they were equally situated.
>
> It is true that Columbia was developing its position, but fundamentally regarded them as equally situated competitors, and I think they would have shared the market equally.

(Examination of Dr. Bowman, N.T. 507). The credibility of Dr. Bowman's analysis of the relative strengths of Columbia and Kaiser absent antitrust violations was a question for the jury.

However, Dr. Bowman was obliged to demonstrate that he took other potential competitors into account in concluding that a fully competitive aluminum culvert market would be a duopoly. Under cross-examination Dr. Bowman asserted that he took such other firms into account but considered their influence negligible.[3]

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3. After stating there were two "major" sellers, he was asked about a third company:

> Q. So there was a third company. Is it also known as Lane Metal Products?
>
> A. Yes, I had forgotten--
>
> Q. This is a company that is a subsidiary of Bethlehem Steel?
>
> A. Yes, I understand it is.
>
> Q. So you found a third company, Lane, in the local area, selling aluminum pipe in the local area?
>
> A. Yes, that's correct.
>
> * * * * * * *
>
> Q. Why didn't you take Lane into account when you were estimating 50 per cent in the local area?
>
> A. Because Lane was only a very small factor in that market, more negligible.
>
> Q. You mean in reality, they were a small factor? You tried to determine how many pounds they sold or something and you determined they didn't sell many pounds?
>
> A. No. They would have been a small factor. I was making projections of what Columbia would have done in free and open competition.
>
> Q. I am talking about Lane, not Columbia.
>
> A. I thought you were asking about Columbia's 50 per cent share of this sub-area, the local area, and that is what I was attempting to respond to.
>
> Q. What I am trying to determine is did you take into account whether Lane would have any market share in this local market?
>
> A. I took that into account, yes. I considered them as a possibility, certainly.

At the trial Kaiser vigorously attacked Dr. Bowman's assumption that Columbia could have had 50% of the sales in the local area and 30% of the non-local sales. Defendants' witnesses were allowed to testify about possible competitors of Columbia and the entry into the aluminum culvert market of steel culvert producers. Kaiser's expert contested Columbia's alleged share of the market and testified to the fallacies of Dr. Bowman's analyses. Problems in comparing Kaiser's calendar year figures and Columbia's fiscal year figures were also developed at length. Dr. Bowman placed before the jury a market share estimate of his view of Columbia's position in an open market. Since it had some support in the evidence, Dr. Bowman's evaluation of the non-local market and his disregard of competitors was for the jury to consider and evaluate.

NOTES *(Continued)*

Q. Well, did you try to estimate what share they would have gotten?

A. I--yes.

Q. What did you come up with?

A. My analysis suggests that the share they would have gotten would have been very small, essentially negligible.

Q. Essentially negligible?

A. Yes.

Q. [N]either Lane nor Columbia in the non-local--local area were much of a factor, yet you gave Columbia 50% of business and you gave Lane one or 2%. Why is that?

A. Because of the position that Columbia was in, with the facilities they had, production facilities, the ability to produce, the kind of equipment they had, the marketing strategy, the product line they offered, the expertise, the kind of connections they had in the business. They were doing fairly well in '73. As a matter of fact, they had 38% of that local area in 1973.

Q. Did you make any analysis--similar analysis of Lane Metal Product as a subsidiary of Bethlehem Steel to see if they had the ability to market in this area under your projections?

A. I didn't do a specific detailed study of Lane, no, I did not.

(Cross-examination of Dr. Bowman, N.T. 613, 614-15, 617).

After Dr. Bowman estimated how much pipe Columbia would have sold in unrestrained local and non-local markets, he multiplied these figures by the estimated selling price for each pound of pipe to ascertain Columbia's gross revenues. The next and final step in estimating the lost profits was to deduct Columbia's estimated expenses in a market free of Kaiser's antitrust violations.

Defendants contend several aspects of Bowman's projected expenses are unrealistically low. But to the extent Dr. Bowman's estimates were supported by some evidence on the record, we cannot state that the jury had no basis upon which to base its evaluation. Dr. Bowman arrived at a figure for Columbia's hypothetical interest expense that was quite low. The actual rate at which Columbia was able to borrow during the damage period was 3.75% above the prime rate. This money was obtained from Columbia's sole banking lender, the Philadelphia National Bank. Dr. Bowman found the average prime rate during the damage period to be approximately 8% (N.T. 559). Instead of using the average percentage of 11.75%--prime plus 3.75%--for Columbia's borrowing costs, Dr. Bowman estimated that in a free and open market Columbia's interest rate would have been 9.5%, the 1975 BAA bond rate. (N.T. 559).

Dr. Bowman admitted that companies of Columbia's size "would not generally borrow with bonds; that is, they tend to borrow directly from a bank instead of a bond." (N.T. 559). But there was testimony from the PNB bank officer for the Columbia account, that had Columbia not been injured by Kaiser's anticompetitive acts it would have been able to borrow funds more cheaply (N.T. 1310); the jury was informed that this bank would recover its unpaid loans (in excess of $320,000) from any award to plaintiffs. But the basis for Dr. Bowman's hypothetical interest rate was not "thin air." *In re IBM, supra* at 1019. There is no justification for entering a judgment notwithstanding the verdict on lost profits on the sale of aluminum culvert pipe.

LOST PROFITS ON CORRUGATED ALUMINUM SHEET

Columbia's business was fabricating culvert pipe. Although it never actually engaged in any other business, plaintiffs contend that Columbia was ready and willing to begin fabricating flat aluminum sheet, the product from which other fabricators make riveted rather than spiral pipe, and would have been able to do so but for Kaiser's antitrust violations. Therefore, plaintiffs sought, and the jury awarded, hypothetical lost profits on the sale of corrugated sheet. There was evidence that production facilities were modified to manufacture corrugated sheet during 1974, and Bonjorno estimated he could have sold 750,000 pounds of corrugated culvert sheet in 1975, 1-½ million pounds in 1976, and 2-½ million pounds in 1977. (N.T. 205).

To allow the award of lost profits for a business that was never actually in operation, the court must first decide whether plaintiffs' entry into such line of business would have been a natural outgrowth of an established business or an expansion into a new market. *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 988 n.20 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978). Relevant considerations include the "history of the expansion and growth patterns of other competitors in the relevant market," whether production facilities have to be varied significantly, and whether "customers for one unit would in all likelihood remain customers for other units." *Id.* Plaintiffs presented no direct evidence that the production of flat sheet was a natural outgrowth of pipe fabrication, but there was some evidence, if believed, that Columbia would have had other fabricators as sheet customers even though the customers for pipe would be direct users. There was evidence not only that the production facilities could be readily modified but that Columbia had so modified them and was equipped to manufacture and supply corrugated tube sheets after 1974 (N.T. 201-5). Therefore, the production of corrugated sheet could have been a natural outgrowth of Columbia's culvert business.

The court's second step is to determine whether plaintiffs presented sufficient evidence to allow the jury to determine that plaintiffs had an intention to enter the business and were

prepared to do so. *Hayes v. Solomon*, 597 F.2d 958, 973 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980). There is much evidence if credited that plaintiffs had the requisite intention, but the record is not as clear that they were so prepared. The Fifth Circuit has listed four elements of preparedness: (1) the ability of plaintiff to finance the business and to purchase the necessary facilities and equipment; (2) the consummation of contracts by the plaintiff; (3) affirmative action by the plaintiff to enter the business; and (4) the background and experience of plaintiff in the prospective business. *Id., quoting Martin v. Phillips Petroleum Co.*, 365 F.2d 629, 633-34 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966).

Plaintiffs were unable to finance the purchase of the raw material (aluminum coil) needed to manufacture the corrugated sheet. (N.T. 202). Mr. Bonjorno claimed this was because prices of the finished pipe had been so depressed by Kaiser that it was not economically profitable for customers to buy corrugated sheet, make it into riveted pipe and sell it at a competitive price. (N.T. 186, 202). Bonjorno's assertion that the price of finished pipe was depressed by Kaiser was contradicted by other evidence presented by plaintiffs at trial.

Dr. Bowman testified that in a free and open market the selling price of pipe can be broken down as: 65% for aluminum costs, 25% for other production costs, and 10% for profits (N.T. 537). Taking the cost of aluminum obtained from Alcoa's price lists published during the relevant years (N.T. 538), Dr. Bowman calculated the hypothetical unrestrained selling price of pipe. In Dr. Bowman's words, Kaiser's prices were "substantially the same" as those projected for a free and open market. (N.T. 1480). But the credibility of Bonjorno's explanation for Columbia's inability to enter the corrugated sheet market, whether he might have consummated a contract with Alcoa or sold corrugated sheet to Syracuse Tank, Lane Pipe or others and Columbia's readiness to enter the corrugated sheet business were all for the jury not the judge to assess.

GOING CONCERN VALUE

Defendants argue that plaintiffs cannot recover damages for loss of Columbia's value as a going concern because Columbia had not "terminated its business . . . as a consequence of an antitrust violation by Kaiser." (Defendant's Brief at 105). We agree.

A business that is forced to shut down because of antitrust violations is entitled to damages for loss of going concern value if proved. VonKalinowski, 15 *Antitrust Laws and Trade Regulation* §115.03[4] (1978) (citing cases). This was recognized in our Opinion of June 17, 1981 which rejected an argument that the damages awarded were duplicative. The Opinion recognized that losses for past net profits and reduction in the value of a business are not duplicative absent unique circumstances. Defendants argued that plaintiffs' recovery of lost past profits and their receipt of $574,000 from the sale of Columbia's assets to Howmet Aluminum Corporation ("Howmet") necessarily fully compensated them. But the value of the business as a going concern might have exceeded the amount received from Howmet at the time of sale were it not for the anticompetitive conduct of the defendants. Therefore, an award of damages for loss of value as a going concern was held non-duplicative of actual losses or projected losses from 1974 to 1977 and non-duplicative of the money received from the sale of Columbia's assets to Howmet, so long as the damage award for going concern value was properly adjusted to reflect only goodwill, that is, the discounted present value of the estimated flow of future earnings.

However, that opinion was based on the erroneous impression that the sale of Columbia's assets to Howmet was in May, 1977 the end of the damage period. At that time we did not have the argument on the correct facts more fully developed on the present record: that Columbia was a going concern in May, 1977. Significant intervening factors interrupted the causal connection between plaintiffs' antitrust violations and the going concern value of Columbia as of December 20, 1978 so that it would have been improper to allow recovery for loss of profits as

a going concern on that date. To the extent that we stated plaintiffs were entitled to both the lost past profits as of the time of the sale to Howmet (December 20, 1978) and the loss of value of the business as it would have been absent defendants' violation of law in May of 1977, we were in error because it is now clear that Columbia's business had not been terminated as of that date losses were allowed for its termination or destruction.

For recovery of "going concern" damages as well as any antitrust damages, it is well established that a plaintiff cannot prevail merely by proof that the defendant has violated the antitrust laws. He must prove that the violation had a causal relationship to the particular loss of anticipated revenue, that is, that the particular damage to plaintiff flowed from the conduct of the plaintiff. *Rea v. Ford Motor Company,* 497 F.2d 577 (3d Cir. 1974), *cert. denied,* 419 U.S. 868 (1979). *See also, Freedman v. Philadelphia Terminals Auction Co.,* 301 F.2d 830, 833 (3d. Cir.), *cert. denied,* 371 U.S. 829 (1962). Going concern damage is designed to compensate for the harm sustained when a business interest is unlawfully terminated as a result of an antitrust violation. Schneider, *Damages for Termination of a Business Interest,* 49 Antitrust L.J. 1295 (1980).

Antitrust cases concerning "going concern" or "goodwill" damages assume destruction, forced sale or other termination of the business as a necessary predicate to recovery. *Eiberger v. Sony Corp. of America,* 622 F.2d 1068 (2d Cir. 1980) (termination of office equipment dealership); *Pitchford, supra* (termination of scientific instruments dealership contract); *Albrecht v. Herald Company,* 452 F.2d 124 (8th Cir. 1971) (forced sale of newspaper carrier's route); *Lessig v. Tidewater Oil Co.,* 327 F.2d 459 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964) (termination of service station lease and dealer contract); *Osborn v. Sinclair Refining Co.,* 324 F.2d 566 (4th Cir. 1963) (cancellation of service station lease and lessee's dealer sales arrangement); *Twentieth Century Fox-Film Corp. v. Brookside Theater Corp.,* 194 F.2d 846 (8th Cir.), *cert. denied* 343 U.S. 942 (1952) (forced sale of 15-year lease on motion picture theater).

The calculation of going concern value is made as of the date the plaintiff's business was terminated or sold as a result of the illegal conduct. *Bogosian v. Gulf Oil Co.*, 561 F.2d 434, 455 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *Farmington Dowel Products Co. v. Forster Mfg. Co.*, 421 F.2d 61 (1st Cir. 1970). As stated in *Farmington, supra*, "going concern" represents "the value which the business would have had at that time but for [the defendant's] illegal activity." 421 F.2d at 81. Accordingly, not only must there be a sale or cessation of the business but the date must be at the end of the damage period.

Plaintiffs operated their business as a going concern for approximately five months after May 31, 1977.[4] but plaintiffs elected May 31, 1977 as the end of the damage period. A government loan of $600,000 on or about that date permitted Columbia to continue in operation:

> Q. Now you said that the end of the damage period for which you are seeking damages is May--is what, I'm sorry.
>
> A. May 31, 1977.
>
> Q. Why did you pick that as the end of the damage period?
>
> A. It was just about that time or shortly thereafter that we received the proceeds of the EVA [sic EDA] loan, and the metal that the proceeds permitted us to purchase. Had it not been for that loan we would have then had to close our doors once and for all, and we felt that that represented a conservative and fair place to end the damages.

(N.T. 167).

Thereafter, plaintiffs, supplied with aluminum by Alcoa, operated their business as a going concern. Plaintiffs sold Columbia on December 20, 1978, over a year after May 31, 1977, the date plaintiffs concede to be the end of the damage period The proceeds of a loan of $600,000 plaintiffs received from the Economic Development Administration of the United States Department of Commerce were used in the manufacture of steel and aluminum pipe:

> Q. And after it got the $600,000, Columbia went back into operation, did it not?
>
> A. Yes, it did.
>
> Q. And during that time it made aluminum and steel pipe, did it not? . . .
>
> A. We made some small quantity. We tried to make some small quantity of steel pipe, yes.
>
> Q. And you made aluminum pipe?
>
> A. Yes, we did.
>
> Q. What company supplied you with aluminum?
>
> A. Alcoa.
>
> Q. How long was Columbia in operation after it got the $600,000?
>
> A. Approximately five months.
>
> Q. And you stopped production again?
>
> A. Yes.

(N.T. 296-7).

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4. Although Columbia suspended its production, it never ceased doing business altogether prior to May 31, 1977:

> Q. Was Columbia Metal open and in business until at least May 31, 1977?
>
> A. Yes, we were.
>
> Q. Had you ever closed your doors?
>
> A. No, we never had.

(N.T. 150—Bonjorno).

Although the jury could reasonably have used May 31, 1977 as the end of the damage period for purposes of calculating lost profits, it could not as a matter of law apply this date as the commencement of "going concern" damages. May, 1977 was not the time of business termination but rather the time of its rejuvenation. By the time Howmet purchased Columbia the following year and began to reoperate as Howmet Columbia (N.T. 756-57), the going concern value of the company was substantially altered by the receipt of the government loan and numerous other market forces during the period of operation and thereafter.

With respect to going concern damages, the loan of substantial government funds in May, 1977 is not simply another factor to be accounted for by the jury in its overall assessment of the amount of damages due. The $600,000 EDA loan made it possible for Columbia to continue in operation as a going concern. For although Columbia ceased its production in 1975, it "kept its doors open" and renewed production in 1977 *as a result of the EDA loan.* (N.T. 167-69). A business which is in operation, as was Columbia in May, 1977, cannot receive damages for loss of profits it would have had as a going concern. Loss of going concern value is for a concern no longer going, that is, terminated by liquidation or forced sale.

Plaintiffs filed this action in January, 1974; at trial they chose May, 1977 as the conclusion of the damage period; they foreclosed their ability to reccover damages for the time they continued to operate with government financing. The cessation of their operations five months thereafter and sale of the assets of a defunct operation one year after that cannot be attributed to Kaiser on this record. If the jury were to go beyond the damage period to the actual date of sale, charge Kaiser with responsibility for the sale and then assess going concern damages flowing from defendants' activities as of December, 1978, the jury would be forced to rely on prohibited speculations and guesswork.

> If . . . the record discloses that the evidence on which the verdict is based is so critically deficient of proof of an essential fact needed to support the verdict that the jury could only have ventured a guess as to its occurrence, then a judgment notwithstanding the verdict is required.

Hahn v. Atlantic Richfield Co., 625 F.2d 1095, 1099 (3d Cir. 1980) *citing Denneny v. Spegel,* 407 F.2d 433, 442 (3d Cir. 1969) and *Neville, supra* at 1210 n.5.

The uncontested testimony of the plaintiffs that the EDA loan made possible the continued operation of the business beyond the damage period barred recovery for future loss of profits as a going concern as a matter of law even if the record is viewed in the light most favorable to plaintiffs. Therefore judgment for defendants notwithstanding the verdict will be entered as to the damages awarded in Interrogatory 4. We find it neither necessary nor appropriate to grant a new trial because of this issue. A new trial could not change the result as to these damages; the evidence as to the other items of damages and its consideration by the jury was sufficiently distinct to permit their award even if the damages for loss of going concern value is set aside.

Defendants assert several other grounds for the deficiency of the evidence on going concern value, including that the capitalization of profits should have been on a pre-tax instead of after-tax basis and that the use of a 10% capitalization rate was too high for a company such as Columbia. Defendants argue these points persuasively but upon evidence not offered at trial or the proper subject of judical notice at this time; without such evidence on the record it is inappropriate for the court to consider it in the context of post-trial motions. In any event, these matters are moot in light of our denial of going concern damages on other grounds.

OTHER GROUNDS FOR JUDGMENT N.O.V.

Three other contentions of defendants in support of judgment in their favor notwithstanding the jury verdict for plaintiffs merit discussion.

Defendants objected to the admission of evidence on lost profits on sales beyond the relevant geographic area as stipulated by the parties.[5] The evidence of non-local sales which was the basis of plaintiffs' projections undeniably extended beyond the geographic area agreed to by the parties for the purpose of determining liability. But it was not agreed to as a limitation on plaintiffs' damage estimates. As long as there was some evidence that Columbia would have made sales beyond that geographic area, as there was, plaintiffs were entitled to have the jury consider those estimated sales. *Pitchford, supra* at 108-09.

Defendants contend that whatever the actual losses or lost profits, for all practical purposes, Columbia's business was terminated prior to 1977 so that damages could not in any event be awarded beyond 1975. This issue was vigorously pursued on examination and cross-examination of witnesses for both sides and argued to the jury thereafter. The jury was instructed to award damages only for those years during which it was reasonable for Columbia to have continued to operate its business for purposes other than the claim of damages in suit. (N.T. 1540-41). The jury had an adequate basis upon which to decide the length of time for which damages might be awarded to plaintiff.

Defendants also contend that the judgment should be set aside because plaintiffs' theory of damages and the evidence adduced to support it contradicted the theory of liability based upon a "price squeeze." Among the joint activities of defendants relied on by plaintiffs at the trial on liability was a "price squeeze" by which KACC raised the price of aluminum sheet sold to other fabricators; aluminum sheet was transferred to KACSI at a price that permitted KACSI to sell Kaiser fabricated culvert at a low price with which other fabricators could not complete. That is, the difference between the price of the raw material charged by Kaiser and others, such as Alcoa, presumed to follow its lead, and the price charged for the finished product by Kaiser made it impossible for other companies not vertically integrated to sell the finished product competitively.

---

5. The stipulated area extended north through Rhode Island, south through Northern Virginia, and west through eastern Pennsylvania.

In this trial on damages, the calculations of plaintiffs' expert on prices in a free and open market tended to contradict the "price squeeze" theory. The prices he used for raw material (aluminum coil) were the actual prices charged by Alcoa in 1974-77 at which time it allegedly followed the lead of Kaiser. He used these prices to establish a fair selling price in a freely competitive market; those prices were admittedly nearly identical to the average direct selling price actually charged by Kaiser in the damage period. (N.T. 1478-80). Plaintiffs' expert also testified that the relationship between metal cost and the selling price of culvert pipe in a free and open market would have been 65% of sales; Columbia's financial statements for the year 1970 through 1975 showed a raw material cost approximating 65% of sales in each year. Thus, plaintiffs' evidence at the retrial on damages cast some doubt on a "price squeeze" as the basis for liability.

But a "price squeeze" was just one of a number of activities relied upon by plaintiffs at the first trial from which liability might have been found. There was sufficient evidence from which a jury might have inferred that KACSI: attempted to drive Columbia out of business; threatened to place a plant near Columbia if it purchased raw material from other than Kaiser and then later opened a plant in Delaware that had originally been planned for Virginia; charged lower prices from that plant, particularly in southern New Jersey; and extended credit to a former salesman of Columbia against the recommendation of KACSI's credit department. A jury finding on the anticompetitive significance of each of these acts was not requested and no special interrogatories were submitted as to which of the alleged categories of activities violated the Sherman Act or caused antitrust injury to Columbia.

At the first trial plaintiffs estimated damages by using four projection Methods (Methods C, D, E, and F). Method C (P-3012) projected Columbia's sales based upon government figures on new housing starts and new highway construction during the damages period. Method D (P-3013) projected Columbia's sales by utilizing defendant Kaiser's nationwide sales, while Method E (P-3014) used Kaiser sales from the new

Castle, Delaware plant only. Method F (P-3011) relied upon Joseph Bonjorno's estimates of Columbia's potential sales and profits were it not for defendants' wrongdoing. At the time the post-trial motions were decided it did not appear liability and damage issues were inextricably interwoven. The trial on damages and liability had been bifurcated by agreement of the parties, so that there seemed little basis to believe the jury verdict would have been the result of compromise on the liability and damage issues. Because the liability and damage issues seemed sufficiently distinct and severable, a new trial on damages only was deemed fair to both parties and was so ordered. But *cf.*, *Northeastern Telephone Co. v. American Telephone & Telegraph Co.*, 651 F.2d 76 (2d Cir. 1981) (plaintiffs' failure to prove five of six alleged exclusionary activities and lack of certainty that jury based its verdict exclusively on the one remaining practice required all findings on liability set aside; a partial new trial limited to redetermination of damages held improper unless it clearly appeared the issue to be retried was distinct and separable).

Notwithstanding the vigor with which plaintiffs' urged the unassailability of their damage evidence on their motion for reconsideration (later withdrawn), at the damage retrial plaintiff proffered a different expert and a different method for calculation of Columbia's hypothetical share of a freely competitive market. This new testimony on damages if heard by the liability jury might have influenced it to reject or discount the contention of a "price squeeze" by the Kaiser defendants. But this circumstance certainly does not compel the entry of judgment in defendants' favor notwithstanding the verdict. At most it reflects the unforeseen difficulties arising from a limited retrial on damages. Since the court rules now only on post-trial motions concerning the retrial on damages, this consideration is for the Court of Appeals.

The court has considered all other arguments for the entry of judgment notwithstanding the verdict and found them to be without merit.

MOTION FOR NEW TRIAL

When a party moves for judgment notwithstanding the verdict or in the alternative for a new trial, and the court grants judgment notwithstanding the verdict, it is imperative that the court rule on the new trial request so that the litigation will not be needlessly protracted if the judgment is thereafter vacated or reversed by the appellate court. Fed.R.Civ.P. 50(c); 15 Wright & Miller, *Federal Practice and Procedure* §2539 (1971). Defendants advance four grounds for a new trial: that the conduct of plaintiffs' witnesses and counsel was prejudicial and improper; that the verdict was against the weight of the evidence; that the verdict was excessive; and that legal errors were committed throughout the trial.

Plaintiffs' counsel and witnesses during the retrial made some remarks irrelevant to damages issues and prejudicial to Kaiser. Notwithstanding extended discussion with counsel prior to trial and admonitions to counsel during the trial, the findings on liability were overstated or referred to unnecessarily. The testimony of plaintiffs' principal witness conveyed resentment of Kaiser which was not surpising. It seems that a trial limited to damages presented difficulties to counsel for both parties. But these were lapses from perfection in the course of lengthy, complex and vigorously contested proceedings. After reviewing the record as a whole and the instructions to the jury to consider only the issues on damages without prejudice or bias, we are of the opinion that the conduct of plaintiffs' counsel and witnesses does not warrant a new trial on damages.

A new trial may be granted on the ground that the verdict is against the weight of the evidence. *Neville, supra;* 6A *Moore's Federal Practice* ¶59.08 [5] (1982). In terms of the amount of damages awarded, a new trial may be granted when the damages assessed by the jury are "so unreasonable as to offend the conscience of the Court." *Murray v. Fairbanks Morse*, 610 F.2d 149, 152 (3d Cir. 1979). Stated either way, such a motion for a new trial is within the sound discretion of the court. *Id.* at 153. In exercising its discretion, the court may weigh the parties' evidence instead of looking only to whether the verdict winner

has introduced sufficient evidence on each essential element to preclude judgment as a matter of law. *Moore's Federal Practice, supra.* Greater scrutiny of a verdict is called for when the trial is "complicated and deals with a subject matter not lying within the ordinary knowledge of jurors." *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 90-91 (3d Cir. 1960).

Even on a motion for a new trial judicial discretion must be exercised in a manner consistent with plaintiff's right to a trial by jury. The court may not substitute its own judgment for that of the jury merely because the judge as the finder of fact might have reached a different conclusion. That well established principle is not obviated simply because the trial is bifurcated.

> (N)either a trial nor an appellate court has the authority to substitute its judgment for that of the jury and thus usurp the jury's function as the principal finder of fact.

Collins v. Signetics Corp., 605 F.2d 110, 115 (3d Cir. 1979).

At the prior trial this court was guided by that principle. Based on the law of the case determined by the Court of Appeals, it found the evidence sufficient to support the jury's conclusion that defendants monopolized or attempted to monopolize the relevant product market in violation of Section 2 of the Sherman Act. The jury's determination on liability was not so against the weight of the evidence as to shock the conscience of the court. But the deficiency in plaintiffs' proof of damages convinced the court that the verdict as to damages should not stand. The evidence presented by the damage witnesses was incomplete, confusing and lacking in probative value and the factual basis for the estimates of losses was not made clear by the testimony. Since the damage award on that inadequate record had to be vacated, no explicit statement as to excessiveness was deemed necessary to the decision. After a retrial on damages at which plaintiff offered a different expert on damages and a new theory of the measure of damages or at least a new way of calculating damages, the court is faced with a difficult question: if plaintiff could not substantiate an untrebled award of

$1,815,000 at the first trial on damages, what is the effect of an untrebled award of $3,189,313 at this trial?

The record on retrial was different and more fully developed. The evidence was sharply in conflict; the issues were pointedly raised by the direct testimony and extensive cross-examination. Almost all of Bonjorno's statements on the financial history of his company, the state of the market for the years in question, his future intentions and the prospects of Columbia required credibility determinations. The implausibility of deeming Columbia an operating business between 1975 and 1977 was effectively raised. The witnesses on behalf of plaintiffs were subject to impeachment for lack of knowledge, prejudice against Kaiser or interest in the outcome of the case. The assumptions of plaintiffs' expert on the size of the market, Columbia's projected 50% share of a local market and 30% of the entire market were challenged as ignoring viable competitors, inflating revenues and deflating expenses. But all of this was placed before the jury by a fair charge; its role as factfinder in weighing the contradictory evidence and inferences and in drawing the ultimate conclusions as to the facts cannot properly be ignored. Whether the trial judge would reach the same conclusions is irrelevant. So long as evidentiary support for their jury findings exists, "we perceive the resolution of the conflicting claims as the traditional responsibility of the jury." *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975). Therefore the court must refuse to set aside this verdict as excessive and respect the role of the jury in judging the credibility of the witnesses, assessing the weight given to expert opinions and resolving conflicting evidence.

Two judges have previously taken these questions from a jury. At the initial trial, a verdict was directed for defendants at the end of the plaintiffs' case on the ground that the evidence was insufficient to establish a market composed of aluminum culvert pipe or a monopolization of the relevant culvert pipe market and there was insufficient evidence of conspiracy in restraint of trade. The Court of Appeals reversed and remanded for trial. Following that trial, judgment on the verdict in favor of plaintiffs on liability and damages was set aside and a new trial

ordered on damages only. Now this court is requested to set aside a second award of damages by another jury.

"Courts rarely grant a new trial after two verdicts upon the facts in favor of the same party." *Louisville & Nashville Railroad Co. v. Woodson*, 134 U.S. 614, 623 (1980). Wright and Miller, commenting on this dictum in *Federal Practice and Procedure*, Vol. 11 § 2803 at p. 35, observes:

> Of course there is no question but that a third trial may be ordered when the second trial, like the first, has been marred by a legal error. The more difficult question is whether the trial court may set aside successive verdicts as excessive, or against the weight of the evidence. That the power to do so exists seems perfectly clear, but it is equally clear that it is a power to be exercised only in the most exceptional cases. When two juries have reached substantially the same result, the possibility of a miscarriage of justice is very slight. [Footnotes omitted].

The usual circumstances weighing against the exercise of discretion in ordering a third trial on damages were well expressed by the trial judge in *Frank v. Atlantic Greyhound Corp.*, 177 F. Supp. 922 (D.D.C. 1959), *aff'd*, 380 F.2d 628 (D.C.Cir. 1970):

> When a new trial is granted on the ground that the verdict is contrary to the weight of evidence, or on the ground that the damages awarded by the jury are excessive or inadequate, the trial judge takes this action to prevent what he finds to be a miscarriage of justice. This step is taken only in exceptional cases, as great weight must ordinarily be accorded to the verdict of a jury. If a second jury arrives at the same result as did the first, the trial judge may well pause before setting aside the second verdict. Under such circumstances the parties have had two trials. The fact that two juries in effect agreed is entitled to a great deal of significance. Bearing in mind that a motion to set aside a verdict of a jury on the facts should be sparingly granted under any circumstances, *a fortiori* a second verdict reaching substantially the same result on practically the same evidence

> should greatly increase the hesitancy of the Court to award another trial. The possibility that a miscarriage of justice has resulted is greatly diminished under such circumstances. After all, there must be some point at which the granting of new trials in the same case should ordinarily stop. It may well be that if another new trial were granted, the same result would again be reached by a third jury.

177 F. Supp. at 923.

Here these circumstances are not present. The first new trial on damages was granted because there was a lack of an evidentiary basis for expert estimates not just because the verdict was against the weight of the evidence. Moreover, on retrial plaintiffs (perhaps because of the inadequate testimony of their previous damage expert), presented not only a different expert but a different theory of damages or at least a far different method for its calculation. So there has not been a second verdict reaching the same result on practically the same evidence.

But a trial judge should still pause before setting aside this second verdict because of the peculiar procedural posture of this case. The court's discretionary grant of a new trial is now limited to retrial on damages only. Defendants strenuously object to the fairness of this procedure (Defendants' Brief, pp. 18-60) and have preserved for appeal their argument that in practice if not in theory it was prejudicial error. It may be that if another new trial on damages were granted, the same result might again be reached by a third jury but would again be subject to the same objections, reviewable only on appeal. This court's determinations on liability will also be reviewed when this matter is again considered by the Court of Appeals. There may be no retrial at all but if there is to be a one, guidance from the Court of Appeals on the determination of the liability issues and the scope of the retrial is in the interests of the administration of justice and the need of the parties for the final termination of this litigation.

For the above reasons, a new trial as to damages is denied. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

INTERROGATORIES TO THE JURY

1. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused actual losses to Columbia? None___ $ 728,000

2. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused lost profits (exclusive of actual losses) to Columbia on the sale of aluminum culvert pipe? None___ $ 742,520

3. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused to Columbia lost profits (exclusive of actual losses) on the sale of flat corrugated aluminum sheet? None___ $ 80,000

4. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused damage to Columbia for the diminution in value of its business? None___ $1,638,793

/s/
Foreperson

Date: 12/2/81

PLEASE NOTIFY THE MARSHAL
WHEN DELIBERATIONS HAVE BEEN COMPLETED

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

ORDER

AND NOW, this 17th day of January, 1983, the Court of Appeals having granted a remand for the purpose of determining Kaiser's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial filed by Kaiser, it is hereby ORDERED that:

1. The motion of defendants Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. for Judgment N.O.V. is GRANTED with respect to the jury award of $1,638,793 in response to Interrogatory Four as to damages and otherwise DENIED.

2. The alternative Motion of defendants for a New Trial is DENIED.

3. Judgment will be entered on the verdict of the Jury as follows:

Actual Losses	$ 728,000
Lost Profits (Pipe)	742,520
Lost Profits (Sheet)	80,000
	$1,550,520
Trebled According to Law	×3
	$4,651,560

/s/ Norma L. Shapiro
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
vs.	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

FINAL JUDGMENT

AND NOW, this 17th day of January, 1983, the Court of Appeals having granted a remand for the purpose of determining Kaiser's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial filed by Kaiser, the motion of defendants Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. for Judgment Notwithstanding the Verdict having been granted in part and denied in part and the motion of defendants for a new trial having been denied,

IT IS ORDERED AND ADJUDGED

That the plaintiffs Joseph A. Bonjorno, George M. Kerr, Jr. and Barbara K. Clisby, as Transferees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc. recover of defendants Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. the amount of $4,651,560 with interest at the rate provided by law and their costs of action.

/s/ Norma L. Shapiro
J.

BONJORNO, Joseph A., Kerr, George M., and Clisby, Barbara K., as Transferees of Liquidation and Dissolution of Columbia Metal Culvert Co., Inc., Appellants and Cross-Appellees,

v.

KAISER ALUMINUM & CHEMICAL CORPORATION, Kaiser Aluminum & Chemical Sales, Inc., Robert A. Kennedy and Kennedy Culvert & Supply Company and Robert Kennedy, Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc., Appellees and Cross-Appellants.

Nos. 83-1047, 83-1079.

United States Court of Appeals,
Third Circuit.
Argued Sept. 13, 1983.
Decided Dec. 27, 1984.
Opinion on Denial of Rehearing and
Rehearing En Banc March 8, 1985.

Henry T. Reath, Michael M. Baylson (argued), Eric H. Auerbach, Richard L. Thurston, Duane, Morris & Heckscher, Philadelphia, Pa., for appellants and cross-appellees.

Richard P. McElroy (argued), William H. Roberts, Alexander D. Bono, Blank, Rome, Comisky & McCauley, Philadelphia, Pa., Stephen B. Ringwood, Kaiser Aluminum & Chemical Corp., Oakland, Cal., for appellees and cross-appellants.

Before SEITZ, GIBBONS and ROSENN, Circuit Judges.

OPINION OF THE COURT

SEITZ, Circuit Judge.

I.

The plaintiffs appeal from an order of the district court partially granting judgment notwithstanding the verdict which eliminated the largest element of the jury's damage award in an

antitrust action. The defendants, Kaiser Aluminum and Chemical Corporation and Kaiser Aluminum and Chemical Sales, Inc. (collectively "Kaiser") cross-appeal from a judgment entered after a special jury verdict finding them in violation of the antitrust laws. This court has jurisdiction under 28 U.S.C. §1291 (1982).

II. Background

The plaintiffs were the sole stockholders of the now defunct Columbia Metal Culvert Co., Inc. ("Columbia") which was at one time a fabricator of aluminum drainage pipe in Vineland, New Jersey. They allege that Kaiser monopolized the market for aluminum drainage pipe in the Mid-Atlantic region of the United States in violation of sections one and two of the Sherman Act, 15 U.S.C. §§1 and 2 (1982).

Columbia began to manufacture aluminum drainage pipe in 1962. Originally, Columbia purchased all of its raw materials from Kaiser. The raw material for manufacturing pipe comes in two primary forms: corrugated aluminum sheet which is rolled and riveted into pipe, and aluminum coil which is formed into helical pipe by a spiraling machine. Initially, Columbia purchased only sheet, but in 1970, it acquired a spiraling machine, and thereafter produced mostly pipe formed from coil.

In 1972, Columbia and Kaiser had a falling out, after which Kaiser no longer sold coil to Columbia, which thereafter purchased its raw materials from Alcoa and Reynolds. In 1973, Columbia's best salesman, Robert Kennedy, left Columbia to become an independent distributor of Kaiser's aluminum pipe. At the same time, Kaiser opened a pipe fabrication plant only a few miles from Columbia's. In 1974, Kaiser along with the other major aluminum producers raised the prices of aluminum coil and sheet to roughly the same price that Kaiser charged for the finished pipe. Throughout this period, Kaiser produced approximately 80% of all the aluminum pipe used in Columbia's geographical marketing region.

The plaintiffs allege that as a result of Kaiser's conduct, Columbia began experiencing financial difficulties, and stopped producing pipe in 1975. Eventually, Columbia's assets were sold

to a third party in 1978. In 1981, the third party sold the remaining assets of Columbia to Kaiser.

This action was first filed in January of 1974 under section four of the Clayton Act, which gives a private cause of action under the antitrust laws, alleging, *inter alia*, violations of sections one and two of the Sherman Act. At the first trial in 1977, the district court directed a verdict for Kaiser at the conclusion of plaintiff's evidence. This court reversed, holding that there was sufficient evidence to permit the case to go to the jury. *Columbia Metal Culvert Co., Inc. v. Kaiser Industries Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied* 439 U.S. 876, 99 S.Ct. 214, 58 L.Ed.2d 190 (1978). A second trial held in 1979 resulted in a jury verdict for the plaintiffs and an award of damages. The district court, however, granted in part the defendants' post-trial motion for a new trial by ordering a trial on damages only. *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 518 F.Supp. 102 (E.D.Pa.1981). A limited retrial was conducted in 1981, resulting in a damage award of $9,567,939 after trebling. The district court then granted, in part, the defendant's motion for judgment notwithstanding the verdict, reducing the judgment to $4,651,560. 559 F.Supp. 922 (Pa.1983)

The plaintiffs appeal the reduction of the damage award, and the defendants cross-appeal the failure of the district court to grant a new trial or to grant in full their motion for a judgment notwithstanding the verdict. We turn first to the defendants' cross-appeal.

III. The Doctrine of Intra-Enterprise Conspiracy

The defendants contend that the jury verdict must be set aside and a new trial ordered because of the recent decision in *Copperweld Corp. v. Independence Tube Co.*, ____ U.S. ____,104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). In that case, the Supreme Court held that a parent corporation and its wholly owned subsidiary cannot be considered separate entities for purposes of section one of the Sherman Act. Thus, a parent corporation and its wholly owned subsidiary cannot by themselves violate that provision which requires concerted action by

at least two participants. Because the two entities in the section one claim in this case are the Kaiser Aluminum & Chemical Corporation ("KACC") and its wholly owned subsidiary Kaiser Aluminum & Chemical Sales, Inc. ("KACSI"), the defendants contend that the finding of liability must be set aside if the *Copperweld* rationale is applicable to this case.

This court had previously held that the plaintiff could proceed with a section one claim based on a conspiracy between the parent KACC and its subsidiary KACSI. 579 F.2d at 33-35. After oral argument was heard on this appeal, the Supreme Court granted the petition for certiorari in the *Copperweld* case. The parties were asked to submit supplemental briefing on the potential effect of *Copperweld.* After due consideration, we decided to defer resolution of this appeal until after the Supreme Court decided *Copperweld.*

Having now considered the decision of the Supreme Court, we believe that it is unnecessary to reach the issue of the applicability of *Copperweld* because the damage award may be sustained solely on the separate section two verdicts that do not depend on a theory of intra-enterprise conspiracy. Kaiser contends that when a verdict may rest on either of two claims, one supported by the evidence and the other not, a judgment thereon must be reversed. *See Simko v. C & C Marine Maintenance Co.*, 594 F.2d 960 (3d Cir.), *cert. denied*, 444 U.S. 833, 100 S.Ct. 64, 62 L.Ed.2d 42 (1979). The case that Kaiser cites, *Simko,* rested on a general verdict in which it is impossible to determine if a jury found the defendant liable on both grounds or only one ground. In this case, special interrogatories were submitted to the jury on each of the theories of liability, and the jury determined that the defendants violated both section one and section two of the Sherman Act. Under these circumstances, we are not required to remand for a new trial solely because the section one claim may be invalid.

The defendants argue, however, that the causation of damages from the monopolization and attempt to monopolize verdicts are also tainted by the theory of intra-enterprise conspiracy. The jury returned separate verdicts against the defendants for monopolization, attempt to monopolize, and

conspiracy to monopolize under section two. Although the conspiracy verdict, which depended upon an intra-enterprise conspiracy, was separately rendered, only a single interrogatory was asked as to causation of injury. The jury answered "yes" to the question: "[W]as any such defendants' monopoly, conspiracy to monopolize, or attempt to monopolize as found by you a material and proximate cause of any injury to the business or property of the plaintiff?"

The defendants contend that *Copperweld* must necessarily apply to a section two conspiracy to monopolize, and since the jury was not asked separate questions on proximate cause, it is impossible to determine if the jury found that the injuries were caused by an impermissible theory of liability. The defendants' contentions succeed only if it were possible that the jury could infer that some of the plaintiffs' injuries resulted solely from the conspiracy and not from the monopolization or attempt to monopolize. Assuming without deciding that *Copperweld* applies to a section two conspiracy, we conclude that it was not possible for a reasonable jury in this case to find that injury was caused by conduct pursuant to the conspiracy that was not also conduct in furtherance of the monopolization or the attempt to monopolize.

Specific intent is an element of a conspiracy to monopolize. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626, 73 S.Ct. 872, 889, 97 L.Ed. 1277 (1953); *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 154 (3d Cir.1981), *cert. denied*, 455 U.S. 1019, 102 S.Ct. 1715, 72 L.Ed.2d 137 (1982). Because the jury was charged that it had to find that there was a specific intent to monopolize before returning a verdict on conspiracy to monopolize, the jury necessarily found that both the parent KACC and the subsidiary KACSI had the specific intent to monopolize the aluminum pipe market. Thus any concerted activity undertaken in the conspiracy that could give rise to damages would have been undertaken with the purpose of monopolization. Because the conspiracy defendants are the same defendants in the monopolization and attempt to monopolize charges, any activity in the conspiracy, which must

have had the purpose of monopolization, would necessarily be attributable to the same defendants as part of the monopolization or attempt to monopolize.

Furthermore, the defendants do not point to any evidence in the record that evinces actions in the conspiracy that could give rise to damages and that are not necessarily part of the attempt to monopolize or the monopolization. Thus, under the particular circumstances of this case, we conclude that the jury verdict and award of damages would be the same even if the jury had not been instructed that KACC and KACSI could be considered separate entities.

IV. The Monopolization Claim

A. The Effect of This Court's Decision in 1977

We next turn to Kaiser's contention that its motion for a judgment notwithstanding the verdict should have been granted because the evidence was insufficient to support the claim of monopolization or attempt to monopolize. The plaintiffs argue that Kaiser may no longer raise this issue because this court had determined on the appeal from the first trial that there was sufficient evidence of monopolization to go to the jury. *Columbia Metal Culvert Co. v. Kaiser Industries Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876, 99 S.Ct. 214, 58 L.Ed.2d 190 (1978).

The evidence presented at the liability 1979 trial, however, differed in several material respects from the evidence presented at the first 1977 trial. In particular, the plaintiffs' evidence at the later 1979 trial significantly undercut the economic significance of the facts that the parent KACC charged its subsidiary KACSI a price for aluminum sheet and coil that was well below the market price while at the same time KASCI was selling coil to independent pipe fabricators at the higher market price. Kaiser's pricing policies with respect to its subsidiaries and to independent fabricators were elements of our earlier decision. 579 F.2d at 31.

Because there were material differences in the evidence presented at the two trials, we believe that the question of the

sufficiency of the evidence presented at the 1979 liability trial is still open for review. *See Johnson v. Bernard Ins. Agency, Inc.*, *532 F.2d 1382, 1384 (D.C.Cir.1976).*

B. Sufficiency of the Evidence of Monopolization

There are two main elements in monopolization: "(1) the possession of monopoly power in a relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *United States v. Grinnell*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966); *Borough of Landsdale v. Philadelphia Elec. Co.*, 692 F.2d 307, 311 (3d Cir.1982).

Kaiser's contentions on liability in this appeal go to the question of whether there is insufficient evidence that its alleged conduct demonstrates the willful acquisition or maintenance of monopoly power.[1]

In reviewing a record for sufficiency of the evidence, this court must expose the evidence to the light most favorable to the non-movant with the advantage of every fair and reasonable inference. *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962); *Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171 (3d Cir. 1976), *cert. denied*, 429 U.S. 1053, 97 S.Ct. 767, 50 L.Ed.2d 770 (1977).

1. *Kaiser Attempted to Control Its Competition.* There was evidence that Kaiser attempted to control the independent fabricators by requiring them to purchase all of their raw materials from Kaiser. Mr. Bonjorno of Columbia, and Mr. Arvay of U.S. Aluminum, a South Carolina fabricator, both testified that Kaiser attempted to coerce the fabricators into purchasing only from Kaiser. There was testimony that Holmes Collins, the Kaiser manager of the division that manufactured

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1. In this appeal, Kaiser does not contest that the relevant product market is aluminum drainage pipe, or that the relevant geographic market is the Mid-Atlantic states. Nor do any of the issues raised by Kaiser in this appeal relate to whether it possessed monopoly power or whether that power was a consequence of a superior product, skill, or historical accident.

and marketed the aluminum pipe, threatened to open a pipe fabrication plant "across the street" from Columbia if it purchased its raw materials from other sources. There were threats that if Kaiser saw so much as one pound of metal from another producer that it would terminate its relationship with Columbia. When Columbia did purchase aluminum from another company, Kaiser carried through with its threats by locating a pipe plant only 40 miles from Columbia's and by refusing to sell any more coil to Columbia. Finally, there was evidence that Holmes Collins told Columbia's owners that Kaiser would control Columbia's growth and market.

From this evidence, a jury could infer that Kaiser wanted to control the source of the raw materials for the independent fabricators and thus, indirectly, wanted to control the price of independents' finished pipe. The mere location of a plant, or the unilateral refusal to deal may not, by themselves, be antitrust violations. However, the combination of the threats as well as evidence that Kaiser's management had originally requested that the plant be located elsewhere is evidence from which a jury could legitimately infer that Kaiser attempted to control its competition, and failing that, tried to destroy it.[2] *Schine Theatres v. United States,* 334 U.S. 110, 119, 68 S.Ct. 947, 952, 92 L.Ed. 1245 (1948) (threat of opening theatres by a monopolist is evidence of intent) (*Copperweld, supra,* overruled the section one charge in *Schine,* but re-affirmed the section two charge).

2. *Kaiser's Actions to Destroy Columbia.* In addition to locating a plant near Columbia's, the plaintiffs allege that Kaiser engaged in a series of deliberate acts to drive Columbia out of the pipe market. The most serious claims is that Kaiser deliberately raised the price of the raw materials to the same level as the price that it charged for the finished pipe, thus making it impossible for Columbia to operate at a profit if it sold pipe

2. Further evidence of Kaiser's attempt to control or exclude competition lay in the veiled threats that Holmes Collins made to Alcoa. Alcoa's manager testified that Collins stated that "if [Alcoa] thought that [it] could sit back and enjoy a participation in this market by merely being a supplier of coil sheet to independent pipe fabricators, [Alcoa] had another thing coming, or some words to that effect." App. at 1085.

competitively with Kaiser. The plaintiffs term this price condition a "price squeeze."

The evidence and the record show that for a significant period of time in 1974, the distributor list price of Kaiser's aluminum pipe, per pound, was just above, or even below, the market price for aluminum coil. The mere existence, however, of a "price squeeze" is not necessarily an anti-trust violation. The plaintiff must present evidence that the defendants deliberately produced the effect, sufficient to provide a reasonable basis for the jury to conclude that the "squeeze" was not the result of natural market forces such as supply and demand or legitimate competition. *Cf. California Computer Prods. Inc. v. IBM,* 613 F.2d 727, 735 (9th Cir.1979).

To show that the price squeeze was a deliberate act on the part of Kaiser, the plaintiffs produced evidence that Kaiser controlled both the price of the raw material and the price of the finished pipe, and that Kaiser exercised that power. That Kaiser could control the price of the finished pipe is evident. By setting the price at which it is sold to distributors, Kaiser effectively controlled the prices at which the distributors bid to contractors. Further, because of Kaiser's large market share, it was likely that it or one of its distributors would be bidding on nearly every job. In this fashion, Kaiser, if it desired, could keep the prices of the pipe low.

The plaintiffs' evidence of Kaiser's control over the prices of the raw material, aluminum coil, is more problematic. In part, it lies in understanding the nature of the market for aluminum coil and sheet used in fabricating pipe. Prior to 1974, Kaiser and some of the other aluminum producers maintained a separate price list, called a commodity price, for aluminum alloy sold to fabricators to manufacture pipe. The commodity price was usually lower than the general or specification price charged for the same alloy used for other purposes. It was never contended, however, that Kaiser lost money at the lower commodity price, and KACSI usually reported a profit from the sale of coil and sheet at the commodity price. App. at 4674-4824.

Kaiser was not the largest supplier of aluminum coil or sheet to independent fabricators, although if the aluminum used

by its own pipe plants were included, it produced over 80% of the aluminum used for making pipe. Kaiser contends that since it was not the dominant force in the commodity price market for aluminum coil and sheet, it did not control the prices of the raw materials. The plaintiffs' theory, however, was that Kaiser was a price leader, and that Reynolds and Alcoa, the other major aluminum producers, usually followed Kaiser's pricing strategy. Thus, Kaiser's prices would determine the market prices.

The principal evidence in support of this theory was the testimony of Professor Oliver Williamson, an economist and expert in antitrust. He testified that the aluminum industry was an oligopoly limited to a few major producers of aluminum, and that in particular lines of aluminum products, one of the producers became dominant and set the pricing strategy for the rest of the industry. He indicated that the other aluminum producers usually followed the price leader because if an aluminum producer did not comply, it would not be followed in the areas where it was dominant. He further indicated that there were economic studies that tended to show that the price leadership phenomenon was especially noticeable during the early to mid-1970's and that aluminum prices were kept high by the producers during the relevant period.

Further, Dr. Williamson testified that he believed that Kaiser was the dominant firm in setting the prices for aluminum coil and sheet used in making pipe. Dr. Williamson's opinion that Kaiser was the dominant firm in the aluminum pipe area was buttressed with evidence that showed that Kaiser was the largest producer of coil used for pipe, that it was the only major manufacturer who had an extensive marketing and engineering staff who actively promoted and studied the uses of aluminum pipe, and that Kaiser had the largest interest in pipe prices because it sold over 80% of the aluminum pipe in the country. If there were price leadership, it would be most likely that Kaiser set the pricing policies because of its extensive expertise and investment, rather than Reynolds of Alcoa who had so little involvement in the area.

That there was price leadership was supported by the testimony of Thomas Melrose, a manager of Alcoa, and Lonsdale

Lawrence, an engineer from Reynolds. Melrose testified that Alcoa did not independently set prices but followed the prices that Kaiser and Reynolds set for the corrugated aluminum sheet used for making pipe. Lawrence testifed that for corrugated sheet, Reynolds would follow Kaiser's announced prices each time the prices changed. Although Melrose's and Lawrence's testimony was in reference to corrugated sheet and not to coil, their testimony confirms Dr. Williamson's general observations on the existence of price leadership in the aluminum drainage pipe raw material market. Further, the evidence indicated that the prices for coil and sheet as raw materials for pipe did not differ in material respects.

Kaiser contends, however, that the plaintiffs' documentary evidence on the actual prices charged by the three major manufacturers failed to show price leadership. In particular, Kaiser points to evidence that on one occasion Alcoa raised the price of aluminum coil three days before the effective date of Kaiser's comparable price change as proof that Alcoa, and not Kaiser, was the price leader.

Dr. Williamson testified, however, that a pricing change did not have to be initiated by the price leader. Also, Alcoa's price change, although occurring three days before the effective date of Kaiser's change, may have been made after Kaiser announced its change either publicly or privately.

At most, Columbia's pricing evidence was susceptible of an inference inconsistent with price leadership. When contradictory inferences can be drawn from the evidence, the question should be resolved by the jury and it is not a matter for the consideration of the court on a motion for a JNOV. Given that Dr. Williamson's opinion was well supported by the evidence, we cannot say that the question of price leadership should not have gone to the jury.

The next question is whether the evidence shows that Kaiser deliberately manipulated the coil and pipe prices to create a squeeze. There was evidence that the squeeze was not caused by natural market forces.

The most significant evidence of deliberate manipulation of the coil prices was Kaiser's withdrawal of the commodity price

for coil in January of 1974. This caused a steep rise in the price of coil from about 38 cents per pound to about 44 cents per pound. At approximately the same time, Alcoa and Reynolds raised their coil prices to the same price levels. Dr. Williamson testified that he believed that the price hike was made for "strategic" reasons. Even Kaiser's manager, Holmes Collins, testified that the commodity price was withdrawn because Kaiser no longer wished to sell to independent fabricators. Thus, Collins' testimony supported an inference that the price change was not related to costs but was intended to affect the independent competition.

Perhaps some of the strongest evidence that the price sqeeze was deliberate lies in the relationship of the price of coil charged by Kaiser and its distributor price for pipe. If the coil prices charged by KACSI truly reflected the cost of the coil plus a fair return, then the price of the finished pipe should be higher by at least the fabrication cost of the pipe. However, the price of the pipe was often below the price of the coil during the first six months of 1974. Alternatively, if the price of the pipe reflected Kaiser's true costs plus a fair return, then the price of the raw material should be less by at least the cost of the fabrication. Thus, either the pipe prices were too low, or the raw material prices too high.

Further evidence that the price squeeze was deliberate lay in the transfer price system used by Kaiser. The transfer price is the price that the parent KACC charged its subsidiary KACSI for aluminum. The transfer price was a fixed price per pound that is set once a year and reflects the projected direct costs of producing the aluminum and excludes an allowance for corporate overhead. As such, the transfer price is usually well below the market price. Althouh the transfer price system itself is not evidence of classic predatory behavior, Kaiser's system permitted KACSI to set coil prices for its competitors without affecting its pipe costs. Usually, the market price of the raw materials determines the price of the finished product. In this case, Kaiser could set whatever market price it chose for the raw material, within certain limits, without directly affecting its market price for pipe.

Given these facts, there was sufficient evidence for the jury to conclude that Kaiser not only possessed the power to create the price squeeze, but that it exercised that power to destroy its competition. *See United States v. Alcoa,* 148 F.2d 416 (2d Cir.1945).

There is additional evidence that Kaiser sought to destroy Columbia by setting up Robert Kennedy as a distributor. There is evidence that Kaiser extended credit to Kennedy even though its credit department concluded that Kennedy's operation was an "unacceptable credit risk." App. at 4466. The jury could infer that by going against the very strong recommendation of its credit department, Kaiser displayed its intent to drive Columbia out of business. *See Columbia,* 574 F.2d at 31. *Cf. Greyhound Computer v. IBM,* 559 F.2d 488, 498 (9th Cir.1977), *cert. denied,* 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 796 (1978) (If a jury concludes that a manufacturer possesses monopoly power, then it would be precluded from otherwise lawful practices that exclude competition). Although Kaiser contends that the credit department did eventually approve of the Kennedy account, the evidence indicates that during the first year, Kaiser extended Kennedy up to at least $78,000 credit secured by no more than Kennedy's $25,000 letter of credit and by a security interest in the accounts receivable, which was not much more than the security earlier evaluated by the credit department as unacceptable. App. at 4466.

Further, contrary to Kaiser's contentions, we do not consider that Kennedy's dismissal as a defendant renders the evidence of Kennedy's activities irrelevant to the monopolization claims against Kaiser. The district court's instructions in this regard were fully consistent with this court's earler opinion. *See Columbia,* 579 F.2d at 31, 36.

When a monopolist competes by denying a source of supply to his competitors, raises his competitor's price for raw materials without affecting his own costs, lowers his price for the finished goods, and threatens his competitors with sustained competition if they do not accede to his anticompetitive designs, then his actions have crossed the shadowy barrier of the Sherman Act. *See* Handler, Some Unresolved Problems of Antitrust, 62

Colum.L.Rev. 930, 934 (1962). Given the evidence of Kaiser's anticompetitive behavior, we hold that there was sufficient evidence to permit the monopolization claim to go to the jury.[3]

V. Contradictory Evidence Presented at the Liability and Damage Trials

Kaiser also contends that a judgment notwithstanding the verdict (JNOV) should have been granted because the plaintiff produced evidence at the trial on damages that contradicted the evidence presented at the liability trial. Kaiser, however, fails to explain the legal theory supporting its contention.

Normally, when the evidence is contradictory, a JNOV is inappropriate. *Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1178 (3d Cir.1976), *cert. denied*, 429 U.S. 1053, 97 S.Ct. 767, 50 L.Ed.2d 770 (1977). The assumption is that the jury should decide factual issues involving contradictory evidence. In this case, however, no single jury heard all of the allegedly contradictory testimony. Kaiser's argument must be that if a single jury had heard both the evidence on liability and damages, then that jury would not have returned a verdict against Kaiser. Under this theory, however, a JNOV is not the proper remedy in this case. There was sufficient evidence of monopolization to go to the jury, even if, as Kaiser contends, the plaintiffs' introduced evidence that was inconsistent with their theory of liability.

The proper remedy, at best, would be a new trial on both liability and damages. Kaiser, however, does not argue for a new trial on the ground that testimony inconsistent with the theory of liability was introduced at the damages trial.

Even if we were to construe Kaiser's arguments for a JNOV as a request for a new trial in the alternative, we do not believe that substantial justice dictates that a new trial be ordered. *Cf. Scott v. Plante*, 641 F.2d 117, 136 (3d Cir.1981),

3. Kaiser does not contend on this appeal that there was insufficient evidence as to any issues, such as specific intent to monopolize or a dangerous probability of achieving monopoly power, that relate solely to the attempt to monopolize claim. *See Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1348 (3d Cir.1975).

vacated on other grounds, 458 U.S. 1101, 102 S.Ct. 3474, 73 L.Ed.2d 1362 (1982). If the district court committed error, it would have been in its failure to order a full new trial in 1981 when it ordered the limited retrial on damages. In general, the ordering of a new trial is committed to the sound discretion of the district court. In this case, we cannot say that the district abused its discretion. The liability trial was properly conducted and there was no need to expend further judicial resources retrying liability.

In some situations, however, the seventh amendment right to a jury trial is implicated if the issues in the separate retrial on damages are so interwoven with the issues of liability already tried that it is unjust to try the damages separately. *Gasoline Prods. Co. v. Champlin*, 283 U.S. 494, 500, 51 S.Ct. 513, 515, 75 L.Ed. 1188 (1931). In this case, it might be argued that the issues are interwoven if the theory of damages relied upon was inconsistent with the liability theory, thus requiring a single jury to resolve the inconsistency. We believe, however, that the issues are not interwoven because the theory of damages was consistent with the theory of liability.

Kaiser claims that Dr. Bowman, the plaintiffs' expert witness at the damages trial, contradicted the theory that the price squeeze was deliberately caused by Kaiser and not the result of natural market forces. First, Dr. Bowman testified that he could estimate a free market price for pipe by using the price of coil as a base figure and then adding to the coil price a certain percentage of the base figure to account for fabrication costs and a reasonable profit. In choosing a base figure, Dr. Bowman used the actual coil prices charged by Alcoa and Reynolds from 1973 to 1977. Thus, Kaiser charges, the implication of Dr. Bowman's testimony is that the coil prices would have been the same in a free market. However, the theory of liability was not that the prices of the raw materials were too high, but that Kaiser deliberately caused a price squeeze condition. The jury did not find that there was a price conspiracy among Kaiser, Alcoa, and Reynolds. The plaintiff was entitled to show that in a free market, either the pipe prices would have been higher or the raw material prices lower during the period of the price

squeeze. In constructing a hypothetical world free of the defendants' exclusionary activities, the plaintiffs are given some latitude in calculating damages, so long as their theory is not wholly speculative. *See Litton Systems v. American Telephone and Telegraph Co.*, 700 F.2d 785, 822-23 (2d Cir.1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984). Dr. Bowman anchored his theory to the actual prices of coil over a five year period. If he had constructed a hypothetical price for coil to calculate a hypothetical price for pipe, his theory would have been far more speculative. Under present circumstances, we do not believe that the implications of Dr. Bowman's testimony were so inconsistent with the plaintiffs' theory of liability as to warrant a new trial.

The second set of statements that Kaiser alleges contradicts and disproves the price squeeze theory was a statement by Dr. Bowman that the free market price of pipe from 1973 to 1977 would have been "substantially similar" to the actual prices for pipe charged by Kaiser. Dr. Bowman, however, testified also that actual pipe prices were "depressed" and "tended to be lower" than his hypothetical free market pipe prices. App. at 6520 and 6531. If actual pipe prices were lower than the hypothetical prices, then his testimony was consistent with the liability theory. The only inconsistency is that Dr. Bowman appeared to contradict himself when he testified that the prices were "substantially similar."

Dr. Bowman's statements are not necessarily inconsistent. His statements applied to a five year period of time. Pipe prices may have been fair over a five year period and still have been depressed during the shorter time period involved in the price squeeze. Further, even if Dr. Bowman's testimony was internally inconsistent, it was an inconsistency entirely before the damages jury. Dr. Bowman's credibility was properly before the damages jury and is not grounds for a new trial.

VI. Bifurcation of Trial on Liability and Damages

Kaiser next argues that because the liability jury did not distinguish among the alleged anticompetitive acts in its determination of causation, the damages jury could not know

from what acts they could attribute damages. Thus, Kaiser contends, the issues on liability could not be separated from the issues on damages. We believe that Kaiser has confused the questions of causation and calculation of damages. Causation is an element of liability in this case. *See REA v. Ford Motor Co.*, 560 F.2d 554, 557 (3d Cir.), *cert. denied*, 434 U.S. 923, 98 S.Ct. 401, 54 L.Ed.2d 281 (1977). The liability jury properly found causation from only those acts which could evince the defendants' willful acquisition or maintenance of a monopoly. *See Brunswick Corp. v. Pueblo Bowling Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). In finding causation, the jury must find the nexus between the act and the injury. Once a jury has properly found causation of antitrust injury from unlawful activity, however, the damages in this case may be determined without strict proof of what caused which injury as long as the damages are not based upon speculation or guesswork. *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1161 (7th Cir.1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983).

Here, this result follows because it would be extremely difficult, if not impossible, to segregate and attribute a fixed amount of damages to any one act. The plaintiffs' basic injury was that Columbia was driven out of business. Further, the theory of the section two violation here is not that any one act in itself is unlawful, but that all the acts taken together show the willful acquisition or maintenance of a monopoly which damaged and forced Columbia out of business. When the antitrust injury is of an indivisible nature, the courts have permitted a relaxed standard of proof in calculating damages. *J. Truett Payne Co. v. Chrysler Motor Corp.*, 451 U.S. 557, 565-67, 101 S.Ct. 1923, 1929-30, 68 L.Ed.2d 442 (1981); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698, 82 S.Ct. 1404, 1409, 8 L.Ed.2d 777 (1962). When the antitrust injury is of an indivisible nature, and the jury properly found that that injury caused by the defendants' monopolization or attempt to monopolize, and when the plaintiffs' proof of damages does not require distinguishing the various acts by the defendants, then it is unnecessary to segregate the damages according to the specific

causes, and therefore, the issues in the liability trial are not so interwoven with the issues in the damages trial as to require a retrial of both.

VII. Prejudicial Conduct During the Damages Trial

Kaiser contends that the conduct of the damages trial was prejudicial to Kaiser because the jury was informed about some of the anticompetitive acts alleged by the plaintiff. It is of course necessary, when conducting a bifurcated trial before two juries, to inform the second jury about some of the evidence and results of the first trial. *MCI v. American Tel. & Tel. Co.*, 708 F.2d at 1168. This is not to say that the second jury was to evaluate or decide factual issues that were involved in the first trial. In this case, antitrust matters are extremely complex, and it would have been unfair not to give the jury some background material on the trial. Questions of trial conduct are committed to the discretion of the trial court. The trial court attempted to conscientiously balance the need of the jury to know about the case and prejudice to the defendant. We believe that the district court acted in an exemplary manner in its conduct of an extremely long and complicated trial and did not abuse its discretion in permitting the jury to hear some explanation of the finding of liability.

Kaiser also contends that plaintiffs' counsel repeatedly flouted the district court's rules and referred to prejudicial matters. The district court, after reviewing the entire record, concluded that it was not sufficiently prejudicial to warrant a new trial. We find no abuse of discretion. *See Pitchford v. Pepi*, 531 F.2d 92, 106 (3d Cir.), *cert. denied*, 426 U.S. 935, 96 S.Ct. 2649, 49 L.Ed.2d 387 (1976).

VIII. The Calculation of Damages

With respect to the separate trial on damages, Kaiser raises several issues. First, Kaiser contends that its motion for JNOV should have been granted because the projected market share analysis used for plaintiffs' calculation of lost profits failed to account for competition by other independent pipe fabricators.

Kaiser further contends that the failure of an expert to account for significant factors in his analysis was an error of law and subject to plenary review in this court. Presumably, Kaiser must be suggesting that the testimony of plaintiffs' expert is inadmissible because it is unsupported; and if it were struck, then the remaining evidence would be insufficient to support the damages verdict and Kaiser would be entitled to a JNOV.

We note that Kaiser neither raised this issue specifically in a motion for a directed verdict, nor did it object to the jury instructions on this matter. Thus, Kaiser is not entitled to a JNOV, nor may it raise this issue on appeal as an error of law. *See infra Section IX*, Fed.R.Civ.P. 50(b), 51; *Abraham v. Pekarski*, 728 F.2d 167, 172 (3d Cir.), *cert. denied*, ____ U.S. ____, 104 S.Ct. 3513, 82 L.Ed.2d 822 (1984); *Herman v. Hess Oil*, 524 F.2d 767 (3d Cir. 1975).

Even if, however, we were to construe Kaiser's motion for a directed verdict to have raised this question, we would not hold that the JNOV should have been granted. The testimony of Dr. Bowman made clear that he was aware of, and accounted for the presence of other aluminum pipe fabricators. His testimony was supported, and therefore, admissible. At best, Kaiser's contentions go to the weight of the evidence and not its admissibility. That, however, was for the jury. *Pitchford v. Pepi, Inc.*, 531 F.2d 92, 108-09 (3d Cir. 1976).

As to Kaiser's remaining contentions on damages, we have examined the record and conclude that the district court did not err in allowing damages for both lost profits and actual losses; nor did the district court err in failing to instruct the jury on plaintiffs' duty to mitigate damages; nor did the district court err in permitting the jury to consider damages for lost profits on projected sales outside of the geographic and product markets stipulated for liability purposes.

IX. The Plaintiffs' Appeal

The district court granted, in part, Kaiser's motion for JNOV as to one aspect of damages. It eliminated the jury award for diminution of going concern value as inappropriate as a

matter of law when Columbia had not literally gone out of business as of the date used in the damage calculation.

The plaintiffs contend on their appeal that a grant of a JNOV was improper when Kaiser failed to assert this ground in its motion for a directed verdict at the close of the evidence. *See* Fed.R.Civ.P. 50(b). Kaiser made an oral motion for a directed verdict at the conclusion of all the evidence on damages. Kaiser specifically asserted three grounds for a directed verdict: (1) the evidence failed to show that Columbia was injured by Kaiser; (2) the damage calculations included projected sales outside of the stipulated geographic market; and (3) there was insufficient evidence of a price squeeze. Kaiser never raised in its motion for a directed verdict the contention that damages based on a diminution of going concern value may not be awarded in this case.

The specific grounds for a JNOV must be asserted in the motion for a directed verdict. *Abraham v. Pekarski,* 728 F.2d 167, 172 (3d Cir.), *cert. denied,* ____ U.S. ____, 104 S.Ct. 3513, 82 L.Ed.2d 822 (1984). If the issue was not raised in the motion for the directed verdict at the close of all the evidence, it is improper to grant the JNOV on that issue. *Id. See also Mallick v. IBEW,* 644 F.2d 228, 233-34 (3d Cir.1981); *Systemized of New England, Inc. v. SCM, Inc.,* 732 F.2d 1030, 1035-36 (1st Cir.1984); *U.S. Industries, Inc. v. Blake Const. Co., Inc.,* 671 F.2d 539, 548 (D.C.Cir.1982).

The requirement that the specific issue be raised first in the motion for a directed verdict, before the issue is submitted to the jury, affords the non-moving party an opportunity to reopen its case and present additional evidence. *Lowenstein v. Pepsi-Cola Bottling Co.,* 536 F.2d 9, 11 (3d Cir.); *cert. denied,* 429 U.S. 966, 97 S.Ct. 396, 50 L.Ed.2d 334 (1976). Further, when a trial court decides an issue after it was properly submitted to the jury, it may deprive the non-moving party of his seventh amendment rights. *Id.*

In this case, Kaiser contends that it raised the issue in a colloquoy with the district court concerning jury instructions. A request for jury instrucitons may suffice to fulfill the requirement that a motion for a directed verdict be made before

granting a JNOV only if it is clear that the district court treated the request as a motion for a directed verdict and ruled on it as such. *Mallick,* 644 F.2d at 234; *Lowenstein,* 536 F.2d at 11. We have studied the record in great detail at the places noted in Kaiser's brief and we can find nothing that would have put the plaintiffs or the district court on notice that after all the evidence had been presented Kaiser was raising an issue as to whether damages for diminution of going concern value could be awarded. The record shows that Kaiser only objected to the wording of a jury instruction and agreed that the instruction on diminution of going concern value could be submitted to the jury after it was reworded. App. at 7529-31.

Finally, even if, contrary to our conclusion, we were to assume that Kaiser had properly raised the issue in its motion for a directed verdict, it was error for the district court to have ruled for the defendants on this aspect of the motion for a JNOV. The plaintiffs' theory at trial was that damages for diminution of going concern value could be awarded as of the date that Columbia had effectively gone out of business. The plaintiffs argued to the district court that Columbia had ceased manufacturing operations prior to May 31,1977 and would have gone out of business by that date because of Kaiser's anticompetitive activities if Columbia had not received an Economic Development Administration loan from the United States Department of Commerce. The loan permitted Columbia to continue operations for a few months before it ultimately went out of business and liquidated its assets. The plaintiffs presented evidence to support their theory and the jury was instructed, without objection, as to the plaintiffs' theory.

Kaiser neither submitted contrary jury instructions, nor did it object to the jury instructions as required by Fed.R.Civ.P. 51. The district court also specifically asked counsel for Kaiser whether he objected to the plaintiffs' legal basis for seeking damages for diminution of going concern value, and Kaiser's

counsel raised no objection to the submission of the issue to the jury. App. at 7529-7531.[4]

By granting Kaiser's motion for JNOV, the district court effectively repudiated its own jury instructions even though Kaiser had not challenged the legality of the plaintiffs' damages theory. Having properly submitted the issue to the jury, it was error to rule on a JNOV that the plaintiffs, as a matter of law, could not recover for diminution of going concern value on the ground that Columbia had not actually liquidated on the date used for the damages calculation.

We conclude that Kaiser failed to preserve for JNOV consideration the ground relied upon by the district court to grant the JNOV, and that the district court incorrectly decided that the jury determination was erroneous. To the extent that the district court's order granted the motion for a JNOV, it will be reversed.

X. Conclusion

The order of the district court granting in part the defendant's motion for a JNOV will be reversed. The judgment entered by the district court on January 18, 1983 will be vacated and the judgment entered on December 4, 1981 will be reinstated, and that judgment will be affirmed.

Statement of ADAMS, Circuit Judge, sur denial of the petition for rehearing in banc.

I respectfully dissent from the order denying rehearing in banc, because I believe that this case raises a number of issues of sufficient import to command the attention of the entire Court.

---

4. For example, the plaintiffs submitted a proposed jury instruction which stated, *inter alia*, "An antitrust plaintiff may recover both lost profits and the value of the business as a going concern as of the date the business terminated or made effectively dormant by the actions of defendants." App. at 5601. Kaiser's counsel, when asked by the district court if he had any objections to the instruction replied, "I don't really have an objection to the description of what the plaintiff is seeking to do here, your Honor. It is just the way this is phrased. It is not really an objection to the concept of the charge." App. at 7531.

First, I believe there is a serious question whether Kaiser's contentions regarding the applicability of the Supreme Court's recent decision in *Copperweld Corp. v. Independent Tube Co.*, ____ U.S. ____, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), have been properly answered. Copperweld, handed down after the trial but before the decision of the panel, holds that a parent and a wholly-owned subsidiary are not considered separate entities for purposes of a conspiracy charge under section 1 of the Sherman Act, 15 U.S.C. §1. If there can be no intra-enterprise conspiracy under section 1 of the Sherman Act, Kaiser asserts that logic dictates a similar result under section 2 of the Sherman Act. If Kaiser is correct, then the propriety of the jury's verdict which relied in part on such a conspiracy is called into question.

Second, the bifurcation of the trial resulting in different juries determining liability and damages raises serious questions under the standard set forth by the Supreme Court in *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188 (1931). This Court has recently recognized the continued vitality of *Gasoline Products*—that retrial of only one issue in a case, such as liability, is not proper unless "it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Id.* at 500, 51 S.Ct. at 515. In *Stanton by Brooks v. Astra Pharmaceutical Products, Inc.*, 718 F.2d 553, 576 (3d Cir.1983), this Court emphasized the danger of separate trials on damages and liability, particularly when there is evidence, as here, that the first jury reached a compromise verdict. This is illustrated by the fact that the first jury here returned a damage verdict of $5,445,000 when trebled and the second jury returned a verdict of $9,567,939 when trebled.

Finally, the substantial expansion of the "price squeeze" theory of liability also merits attention. Kaiser has been found guilty of utilizing an unlawful price squeeze even though during the years in question plaintiff was purchasing its raw materials from Alcoa and Reynolds, rather than from the defendant. One essential element of a price squeeze is monopoly power in the raw material. *See United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945). Therefore, it appears to

be a significant extension of the price squeeze doctrine to predicate antitrust liability on such a basis in a case in which the defendant is not selling the raw material in question to the plaintiff and there is no evidence of any conspiracy between defendant and the other suppliers of the raw material.

Each of these important issues would appear to warrant further attention by the entire Court.

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA 19106-1790

Sally Mrvos
Clerk

Mr. Michael E. Kunz, Clerk
U.S. District Court
Eastern District of PA
2609 U.S. Courthouse
Phila., PA 19106

July 1, 1986

Re: Bonjorno, Joseph A., etc., et al. Appellants in No. 83-1047 vs. Kaiser Aluminum & Chemical Corporation, etc., etc., Appellants in No. 83-1079
(D.C. Civ. 74-122)

Dear Clerk:

Enclosed is a certified copy of the judgment in the above-entitled case(s), together with copy of the opinion. The certified judgment is issued in lieu of a formal mandate and is to be treated in all respe cts as a mandate.

( ) We return herewith the certified record in the case(s).

(x) We release herewith the certified list in lieu of the record.

Kindly acknowledge receipt for same on the enclosed copy of this letter.

Counsel are advised of the issuance of the mandate by copy of this letter. A copy of the certified judgment is also enclosed showing costs taxed, if any.

Very truly yours,

/s/
Chief Deputy Clerk
Direct Dial 597-3135

sa
Enclosure
cc: Michael M. Baylson, Esq.
Richard P. McElroy, Esq.

P.S. To the Clerk of the District Court Also enclosed are the following:

1. Certified copy of the Order dated July 1, 1986
2. Certified copy of Stipulation.

United States Court of Appeals
FOR THE THIRD CIRCUIT

Nos. 83-1047 & 83-1079

BONJORNO, JOSEPH A., KERR, GEORGE M.,
and CLISBY, BARBARA K., as Transferrees
in Liquidation and Dissolution of
Columbia Metal Culvert Co., Inc.,
Appellants and Cross-Appellees

vs.

KAISER ALUMINUM & CHEMICAL CORPORATION,
KAISER ALUMINUM & CHEMICAL SALES, INC.
ROBERT A. KENNEDY and
KENNEDY CULVERT & SUPPLY COMPANY and
ROBERT KENNEDY
Kaiser Aluminum & Chemical Corporation and Kaiser
Aluminum & Chemical Sales, Inc., *Appellees and Cross-Appellants*

(D.C. Civil No. 74-0122)
ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, GIBBONS and ROSENN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel September 13, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, entered January 18, 1983, which granted in part the defendant's motion for a judgment n.o.v. be and the same is hereby reversed. It is further ordered and adjudged that the judgment of the said District Court entered January 18, 1983, be and the same is hereby vacated and the cause remanded to the said District Court which is directed to reinstate the judgment entered December 4, 1981, which is affirmed. Costs taxed in

favor of appellants and cross-appellees. All the above in accordance with the opinion of this Court.

ATTEST

/s/ Sally Mrvos
Clerk

December 27, 1984

Nos. 83-1047 & 83-1079

Certified as a true copy and issued in lieu of a formal mandate on July 1, 1986.

Test:

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

Costs taxed in favor of aplt./crs. appee as follows:

Briefs and Appendix $3,120.00

INTEREST ON JUDGMENTS IN FEDERAL LITIGATION

28 U.S.C. §1961

Curtis R. Reitz
Algernon Sydney Biddle Professor of Law
University of Pennsylvania

October 1986

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INTRODUCTION

The purpose of this paper is to explore the law and the rationale for the law regarding awards of interest on judgments for money in federal litigation. I have been studying developments in the law of interest recovery for some time. At the request of counsel for plaintiffs in *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, No. 74-122, now pending in the United States District Court for the Eastern District of Pennsylvania, I undertook to present, in this paper, the results of my study as they apply to interest on judgments under federal law.[1] Although I have been retained as a consultant, the views expressed are entirely my own.

Much recent ferment has occurred in the law regarding interest on judgments, a subject once marked by stolid inertia and lack of significant controversy. Present federal law regarding interest on judgments is in a state of disarray. The law has developed in a fragmentary way which has tended to obscure the policies animating awards of judgment interest to successful litigants. However, an examination of existing law in light of these fundamental policies reveals a consistent, coherent, and principled approach to issues of interest on judgments in cases of varying procedural complexity.

The primary purpose of interest on judgments is to accomplish the restitutionary goal that neither party to litigation shall obtain benefits or suffer losses because of the time required for litigation to run its course. The elementary economic fact is that money has time-value. The time value of money associated with periods of litigation inures to the benefit of defendants. Plaintiffs incur reciprocal losses. A fundamental legal policy of long-standing duration held that judgment debtors should be required to surrender the benefits derived from delay in performance of their monetary obligations and that these sums should be awarded to plaintiffs. Effectuation of that public policy became more important and more complex as the time value of money soared in the past fifteen years.

---

1. In the ongoing study, I have been considering pre-judgment interest and interest on judgments in state and federal law.

In the past, the law assessed the cost of delays between verdict and payment by reference to "legal" rates of interest, representing the highest non-usurious rates applicable to marketplace transactions. A remedy so measured adequately compensated successful parties for litigation delays in an era of low, stable interest rates. However, in the present climate of high interest rates, low rates of interest deny successful litigants full compensation and encourage unsuccessful parties to prolong the period between verdict and payment of damages.

The current federal statute governing awards of interest on judgments, 28 U.S.C. §1961, allows judgment interest at rates of interest found in the marketplace. This statute, amended in 1982, was intended to provide more adequately for compensation to successful litigants. Its proper application depends upon principled analysis of three questions:

1. In extended litigation, what judgment determines that interest is properly allowable (*i.e.*, what event in the litigation triggers the "vesting" of what previously was only an "inchoate" right)?
2. For what period of time is interest to be allowed?
3. What is the rate at which interest is to be awarded?

As to the first question, interpretation of §1961 and a related procedural rule (FED. R. APP. P. 37) demonstrates that interest becomes properly awardable on the issuance of that judgment which concludes the litigation on the merits. Until such a judgment is rendered, a litigant is invested with no right to recovery and hence no right to receive compensation for the time value of his award. Entry of the ultimate judgment appropriately determines the law under which a litigant's rights to interest are measured.

With respect to the issue of the period over which interest is awardable, the statute and applicable precedent demonstrate that an award of interest may (and frequently does) antedate the judgment in which a successful litigant's right to interest is established. To fully effect the restitution function of interest on judgments, such interest begins to accrue from that point where the amount of a litigant's damages has been fixed and is no longer subject to any adjustment for time value of money.

Finally, on the issue of the proper rate at which interest on judgments is awarded, 28 U.S.C. §1961 contemplates that a court refer to the Treasury bill rate in effect at the time interest begins to accrue. The rate thus determined applies to all interest due the successful litigant, and interest is compounded annually. The present version of 28 U.S.C. §1961 became effective on October 1, 1982. Conflict has arisen over how that statute applies to litigation under way on the effective date of the statute and concluded thereafter. Sound policy considerations and precedent support application of the current statute to judgments entered after October 1, 1982, even though part of the proper period of interest accrual came before that date.

I. TIME VALUE OF MONEY, INCONSTANT DOLLARS, AND THE LAW

A. Introduction

The primary judicial remedy in the Anglo-American legal system is the money judgment. Prevailing plaintiffs in actions for this remedy establish that a cause of action ripened on a date before the commencement of litigation. Typically, the basic amount fixed in a money judgment is the amount due as of the time that the cause of action ripened. Litigation is inevitably time consuming. The date when the litigation process establishes the amount of money due will be later, and sometimes will be very substantially later, than the date on which the cause of action ripened. Much further delay is likely before the litigation process concludes and the judgment can be executed. A major corollary branch of the law of remedies takes into account the effect, on the relief to be granted, of the lapse of time between the date that a legal obligation ripened and the date on which that obligation is finally met.

Transformation of a matured claim for monetary relief to a specific sum of money paid in satisfaction of adjudicated liability, given the time requirements, poses a fundamental policy question: how shall the economic consequences resulting from passage of time consumed by litigation be distributed between the parties? The overall answer has been to adjust the amount to

be paid on payment day in accordance with the basic tenets of restitution, the most elementary principle of the law of remedies. Any obligor benefits from delay in performing the obligation to pay a sum of money. Defendants necessarily receive the benefits of delay. Conversely, plaintiffs suffer loss from delay in receiving sums of money. Sound policy regarding distribution of economic consequences has been to require defendants to surrender benefits received and to compensate plaintiffs for losses incurred by the delay in obtaining money due.

During the past two centuries, the law developed, in piecemeal fashion, to vindicate the policy judgment that defendants should disgorge to plaintiffs benefits obtained by delay in payments. Complementary bodies of law emerged to adjust the nominal amounts of plaintiffs' claims in accordance with the restitution objective. One adjustment occurs in the fact-finding function, which attempts to fix the amount of the money to be recovered in values current at that time. The primary method for doing so is the inclusion of so-called pre-judgment interest in a fact-finder's statement of the amount then due. The second adjustment centers on the time, after the fact-finding function has closed, until a defendant ultimately satisfies a judgment by payment. This adjustment adds interest on the principal sum of the fact-finder's determination. This secondary adjustment is dealt with under the law of interest on judgments, sometimes called post-judgment interest.

The fragmentary nature of the legal developments and their interpretation obscures at times the clear and compelling policy that underlies the network of remedial doctrines. The pattern consists partially of common law, created case-by-case over time by courts deciding specific controversies. Other parts of the larger scheme are statutory. Proper application of any part of the laws in this area is made more understandable by placing any specific question in the context of the larger purposes and policies of the law.

Historically, legal documents occurred within a general sense of the restitutionary principle, but without overt recognition of how a particular remedy fitted into a larger scheme. Past failures to focus on the issues more comprehensively may be

explained in part by the relatively minor amounts at stake in transforming past values of monetary obligations to present value. The principal sums in question in litigated cases were the predominant concern. In more recent years, that relationship has changed dramatically. The adjustments necessary to take into account the consequences of passage of time on the value of a sum of money have become one of the most important aspects of remedial law. More than ever before, the need is manifest to see comprehensively the framework for the questions presented and to handle intelligently the application of statutory and common-law rules in particular controversies.

Before considering these legal developments, it is useful to review the fundamental economic forces that determine the time value of money and the extraordinary scale of recent changes in that value in the marketplace. The sharp rise in the time value of money in the "real world" etches new importance on judicial remedies intended to take account of the time value of money.

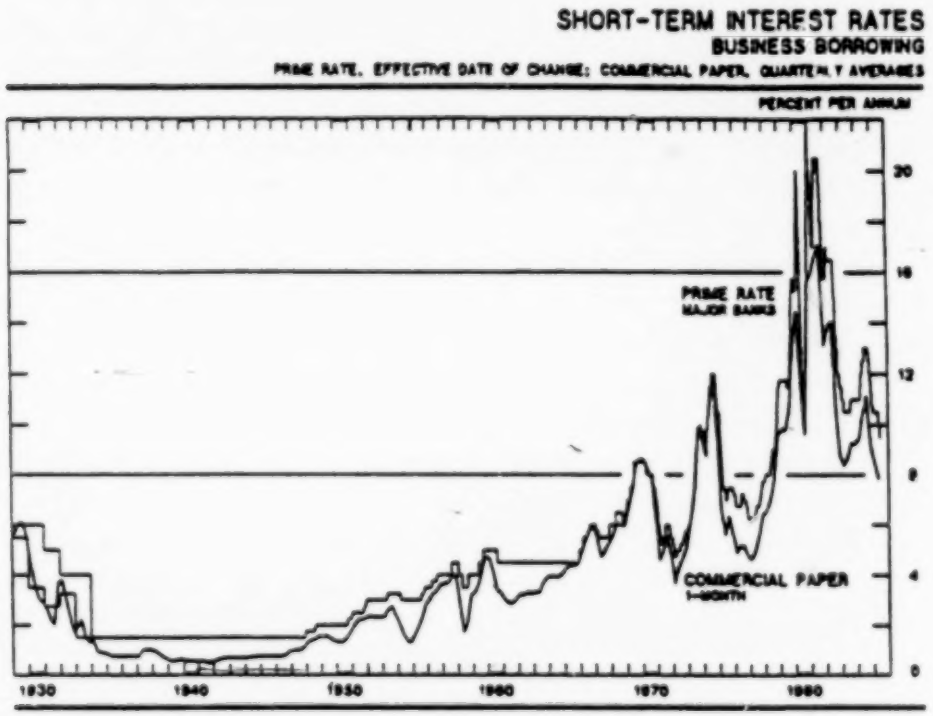
B. A Look at the Marketplace

During the last decade and a half, the time value of money in the marketplace soared to unprecedented high levels. Time value of money is reflected in the various rates of interest charged by lenders and paid by borrowers in voluntary transactions. High interest rates continue to be a major concern on the governmental agendas of the President, the Congress, and the Federal Reserve Board. Current sluggishness in growth of the United States economy is widely attributed to this factor. High interest rates vitally affect businesses and individuals in their use of credit. Despite the recent success in controlling inflation, real interest rates remain extremely high relative to the experience of the past.

The history of two common credit transactions, involving short-term borrowing by business entities, reveals the precipitousness of the recent rise in the time value of money. Lending institutions charge their customers varying rates of interest on short-term line-of-credit loans. The so-called prime rate is that

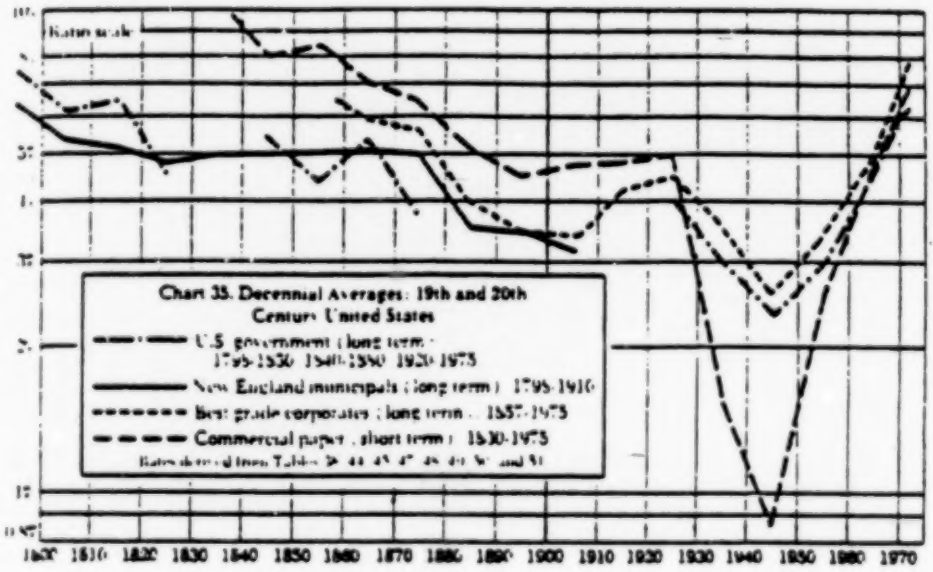
used by a bank with its most creditworthy business borrowers, usually major corporations. Prime rates serve as a basic yardstick for determining rates for less creditworthy business borrowers, who are charged and pay a stipulated number of "points over prime." Business entities also borrow by selling commercial paper, loans of a fixed but short-term duration. The rate of interest paid in commercial paper transactions is another indicator of time value of money. Aggregate data on prime rates and commercial paper rates are collected, averaged and published to show changes in time value of money over periods of time.

The following chart, published by the Federal Reserve Board, shows the levels and the movement of prime rates and commercial paper rates since 1930. The extraordinary peaks in the late 1970's and early 1980's reflect an economic cataclysm that still wracks the economy.



Source: Federal Reserve Board, 1985 Historical Chartbook 99

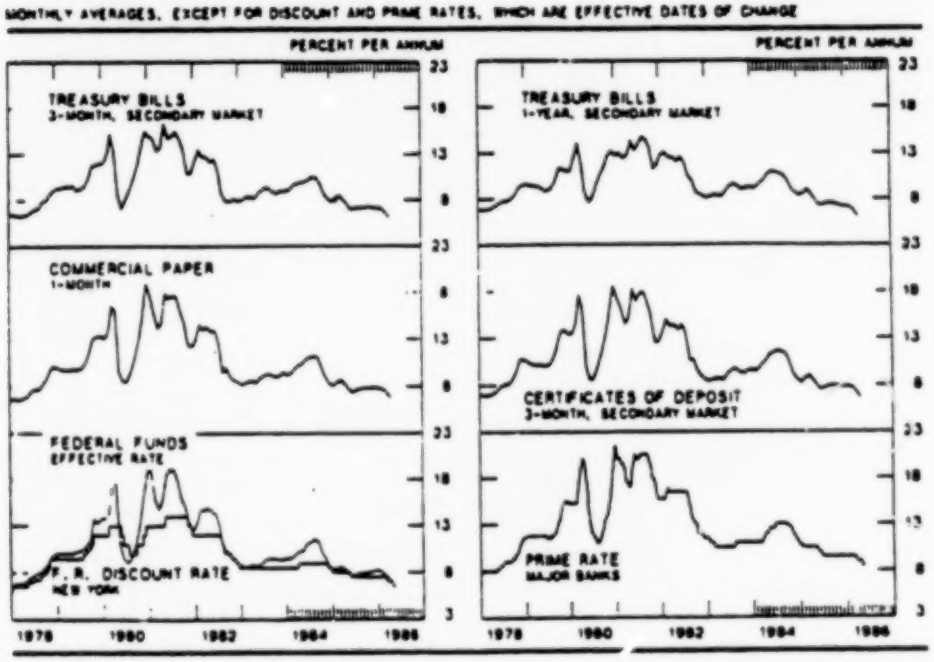
The general pattern of rates evident in the Federal Reserve Board's Historical Chartbook has been traced back well before 1930. The authoritative historian of interest rates, Winslow Homer, compiled the following 200-year chart of rates on a number of long-term and short-term credit transactions, including short-term commercial paper from 1830 to 1975.[2]



2. *See* W. Homer, A History of Interest Rates 339 (2d ed. 1977).

For the most recent decade, the Federal Reserve Board publishes monthly a more detailed chart of interest rates, showing the major banks' prime rates and the rates on commercial paper, together with rates applicable to certificates of deposit (borrowing by banks) and three federal credit transactions.

SHORT-TERM INTEREST RATES



Source: Federal Reserve Board, Chartbook 72 (May 1986).

The data reported on nominal interest rates reflect the time value of money at the dates indicated and the changes in the time value of money from time to time. It should be evident that the changes reported, particularly the extreme heights experienced in the past fifteen years, represent a reaction in part to the shrinking purchasing power of a dollar. If, due to price inflation, the purchasing power of a dollar is declining, the time value of money takes into account that debts will be paid in dollars worth less than the dollars borrowed. The decline in the purchasing

power of a dollar with respect to purchases by business entities is reported in the following table:

PURCHASING POWER OF THE DOLLAR: 1940-1986

(Obtained by dividing the average producer prices index for the 1967 base period ($1.00) by the producer prices index for a given period.)

1948	$1.252	1967	1.000
1949	1.289	1968	.972
1950	1.266	1969	.938
1951	1.156	1970	.907
1952	1.163	1971	.880
1953	1.175	1972	.853
1954	1.172	1973	.782
1955	1.170	1974	.678
1956	1.138	1975	.612
1957	1.098	1976	.586
1958	1.073	1977	.550
1959	1.075	1978	.510
1960	1.067	1979	.459
1961	1.067	1980	.405
1962	1.064	1981	.371
1963	1.067	1982	.356
1964	1.063	1983	.351
1965	1.045	1984	.343
1966	1.012	1985	.340

Source: Statistical Abstract of the United States 1986; Survey of Current Business (March 1986).

This table shows, for example, that a payment of $100 in 1985 to satisfy the principal of a $100 obligation incurred in 1967 would mean that, in real value, a $34 payment satisfied the $100 debt. The marketplace does not allow such a phenomenon to occur. Nominal rates of interest adjust so that a creditor receives, in more or less constant dollars, both the principal of

the debt and a return for the use of the money by the debtor during the credit period.

Marketplace rates of interest are the proper source to consider in measuring the judicial remedies that take into account the time value of money. The restitution principle that calls for defendants to give up benefits received by delays in performance of monetary obligations refers to benefits obtained or obtainable in the marketplace. Likewise plaintiffs' losses, suffered by reason of delays in the performance of monetary obligations, are losses measured basically by marketplace costs. Delay in performance of a monetary obligation is, in a real sense, an involuntary loan by plaintiff to defendant. Marketplace indicators of the time value of money provide, therefore, the best source for determining the legal measure of recovery for these involuntary loans.

C. Legal Remedies for Time Lapse: An Overview

Remedial law takes account of the reality that money has time value at two key points in the unfolding of litigated cases. The first usually occurs at the end of the fact-finding process when the dollar value of a plaintiff's claim is fixed by verdict or court finding. The second occurs when a defendant pays a final judgment. At these two points, and only at these points, recognition is given to the time value of a sum of money.

In litigation that results in a money judgment, one fact-finding goal is to express the amount of a plaintiff's claims in terms of present value. The gravamen of plaintiffs' claims tend to be losses incurred, obligations dishonored, or rights invaded at an earlier time. Typically, fact-finders measure the value of those claims as of the time they ripened and, as a corollary remedy, add an additional amount to adjust for the time value of money from the historical events to the dates of decision. The added amounts of the corollary remedy for time value of money are commonly called pre-judgment interest. More accurately,

that corollary remedy would be designated as pre-verdict or pre-finding interest.[3]

Litigation does not end with a jury verdict or court finding that determines the amount a defendant then owes to a plaintiff. In theory, a defendant might promptly pay the specified amount, but litigation runs its course to judgment. In jury trials, the post-verdict stage of further proceedings in the trial court may be extensive: consideration of motions for new trial, motions for judgment notwithstanding the verdict, and more. Bench trials, too, may involve additional proceedings prior to final judgment in the trial court. Moreover, frequently, trial court judgments are appealed, with sometimes more than one level of appellate review. Post-verdict or post-finding proceedings may take years, during which time the amount determined to be due by the fact-finder usually remains unpaid. Ultimately, final trial court judgments are entered after all issues have been revolved.

When defendants eventually pay these final judgments (or when the judgments are executed), the second adjustment is made to take account of the time value of the money defendants are legally obligated to pay plaintiffs. Starting with the amount

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3. In the past, courts generally declined to award pre-judgment interest in cases where the amount of a plaintiff's principal claim was uncertain prior to verdict or court-finding. The rationale usually given was the supposed unfairness to a defendant who could not stop the accrual of interest liability by payment into court of the contested amount or by some comparable pre-verdict act. This rationale is not valid. A defendant, concerned with the risk of accrual of interest, could pay into court the amount defendant believed to be involved. *See, e.g.* FED. R. CIV. P. 67. More fundamentally, lack of certainty as to the amount of the verdict or finding during the pendency of a claim does not diminish the plaintiff's reciprocal loss.

The historic reticence of courts to allow pre-verdict or pre-finding interest on claims uncertain in principal amount is rapidly disappearing. The effect of refusing a corollary remedy for the time value of money had its greatest impact in personal injury/property damage tort cases. Increasingly, courts now declare that tort plaintiffs are entitled to pre-verdict or pre-finding interest. *See, e.g.*, PA. R. CIV. P. 238.

Further discussion of this issue in the context of interest on judgments appears in the text at notes 34 to 36.

fixed by the fact-finder as the principal sum, remedial law adds interest on the judgment, commonly called post-judgment interest.

The second decision point for taking into account time value of money differs from the first in that, ordinarily, no institutional fact-finder like a jury or trial court is available to act. Interest on judgments is usually calculated by the parties and confirmed by court clerks' decisions to mark judgments "satisfied." The parties and clerks are guided by standard interest calculation formulae established by law.

For interest on judgments, the legal remedy developed to take account of the time value of money uses a standardized measure of the amount of recovery rather than a case-by-case inquiry into the provable benefits derived by a defendant or the provable loss suffered by a plaintiff. The solution has been a statutorily set rate of interest that applies to judgments generally.[4]

Historically, the rates of interest adopted by statutes were the highest rates permitted by usury laws in consensual transactions, often called "legal rates" of interest. As a result, the restitution remedy in the past was generous in relation to marketplace rates.[5] "Legal rates" tended to be 6% or higher, a

4. Pre-judgment interest is taken into account before the fact-finding process has closed, but even here there was a tendency to use a standardized measure of the adjustment required to take account of the time value of money. *See, e.g.*, U.C.C. §3-122(4); RESTATEMENT (SECOND) OF CONTRACTS §354 & comment a (1981). After market rates of interest had escalated to extraordinary levels, plaintiffs began to introduce evidence of their losses as part of the injuries for which they sought relief. Courts then faced the somewhat novel question of having to choose between the traditional standard measures of relief and the measures indicated by vivid losses suffered by plaintiffs. *See, e.g.*, Bulk Oil (U.S.A.), Inc. v. Sun Oil Trading Co., 697 F.2d 481 (2d Cir. 1983). *See also* Keir & Keir, *Opportunity Cost: A Measure of Prejudgment Interest*, 39 BUSINESS LAWYER 129 (1983).

5. When pre-judgment interest was set by marketplace measures, the result was a substantial step-up in the applicable rate of interest when the period of pre-judgment interest ended and the period of interest on a judgment began. *See, e.g.*, Chemical Bank & Trust Co. v. Prudence-Bonds Corp., 213 F.2d 443 (2d Cir. 1954). For a time, when marketplace rates had moved far above statutory rates, a substantial step-down in the applicable rate of interest occurred. *See, e.g.*, Peterson v. Crown Financial Corp., 553 F. Supp. 114 (E.D. Pa. 1982) (pre-judgment rate fixed at 2½% above the prime rate of interest).

rate substantially above those tracked by Professor Homer in his historical study of interest rates in voluntary transactions. The legislative choice for most of the history of interest on judgments was to use a standardized measure of the restitution remedy that exceeded rates of interest paid by the most creditworthy businesses in voluntary transactions.

As marketplace circumstances changed and interest rates soared, the statutorily set rates of interest became anachronistic and, indeed, pernicious.[6] During the past decade, virtually every legislature acted to amend its provision for interest on judgments to fix rates of interest on judgments attuned to the changing values of money in the marketplace.

Successful implementation of the restitutionary objective that amounts recovered in litigation should be adjusted for the time value of money, with utilization of current monetary values being applied to effect the adjustments at two points in the litigation, is as illustrated in a recent celebrated federal case.[7]

Years of litigation elapsed as the case moved through the District Court for Delaware, the Court of Appeals for the Third Circuit, and the Supreme Court. Two key decisions, one at the end of the fact-finding stage and one at the time of payment,

6. The dramatic rise in marketplace rates of interest in the 1970s not only moved those rates above the fixed rates used for remedial purposes, but moved them far above. On any rational economic calculus, the benefit of postponement of payment of monetary obligations, subject to low legal rates of interest, would induce defendants to extend litigation to its utmost. The United States Court of Appeals for the Second Circuit took notice of the differential between marketplace interest rates and legal interest rates in sharp rebukes to defendants for pursuing meritless appeals. Bankers Trust Co. v. Publicker Industries, Inc., 641 F.2d 1361, 1367 (2d Cir. 1981); Brady v. Chemical Construction Corp., 740 F.2d 195 (2d Cir. 1984).

7. For reported decisions, *see* Devex Corp. v. General Motors Corp., 494 F. Supp. 1369 (D. Del. 1980), *aff'd*, 667 F.2d 347 (3d Cir. 1981), *aff'd*, 461 U.S. 648 (1983), *on remand*, 569 F. Supp. 1354 (D. Del. 1983), *aff'd*, 749 F.2d 1020 (3d Cir. 1984), *cert. denied sub nom.* Technograph, Inc. v. General Motors Corp., _____ U.S. _____ 106 S. Ct. 68 (1985), *on remand*, Civil Action Nos. 3058 CMW, 83-567 CMW (D. Del. June 27, 1986).

accomplished the remedial purpose. The former brought the historic value of plaintiff's claim to present value as of the initial court finding for plaintiff. The latter carried the value set by the fact-finding decision forward to the date of defendant's payment of the judgment.

The first decision, the fact-finding decision, established in 1980 that General Motors, having infringed plaintiff's patent, owed imputed royalties of $8,813,945.40. The amounts so fixed were historic values, as of the dates of infringing use. The District Court added $10,912,291.15 to reflect the historic value of plaintiff's royalty claim in present values. *Devex Corp. v. General Motors Corp.*, 494 F. Supp. 1369 (D. Del. 1980). The litigation did not end. Proceedings in the Third Circuit and the Supreme Court consumed additional years. The Supreme Court's decision confirmed the District Court's measure of the time value of the money at stake up to the fact-finding decision. After challenges to the District Court's fact-finding decision had been resolved, the amount of General Motors' obligation was increased by the time value of money on the amount found due in 1980 through the date of payment.[8] The District Court accomplished this by adding interest on the judgment. *See Devex Corp. v. General Motors Corp.*, 749 F.2d 1020, 1022 (3d Cir. 1984). The total recovery on a base claim of $8.81 million, after the two adjustments of the corollary remedy, as $27 million.

The *Devex-General Motors* litigation reflects well the operation of the remedial principle of restitution in an extended

8. The District Court's 1980 finding of the present value of plaintiff's claim was formulated to include a *per diem* amount to be added for each day between the date of the Court's calculation of the amount presently due and the date of entry of judgment in the District Court. This assured that the two periods of adjustment, from claim to findings and from judgment to payment, would meet without gap. *See also* Ashland Oil Inc. v. Phillips Petroleum Co., 607 F.2d 335 (10th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980) (pre-judgment interest ordered to date of district court's second fact-finding decision, the first having been vacated on appeal; interest on the judgment to begin at that point).

controversy of major proportions. The two, back-to-back adjustments effected the basic goal that the outcome of litigation should be shaped so that neither party gains or loses as a result of the lengthy time period required for cases to reach an end.

II. Federal Remedies for Delay in Reaching Judgment Day

Federal law follows the remedial pattern of adjusting the nominal amount of money recoveries to take account of the time value of money through awards of pre-judgment interest and interest on judgments. The primary concern of this paper is the latter adjustment. As will appear, federal courts grant interest on judgments so that the amount recovered by plaintiffs are adjusted to take into account the time value of money associated with the periods of time required for litigation to run its course. Determinations regarding interest on money judgments cannot be made until all controverted questions on the underlying merits-claims have been resolved. When those determinations are made, in the ultimate controlling judgments, federal courts tend to allow interest on the judgments to accrue from the point in a case history where accrual of pre-judgment interest or other method of time valuation of the amount of recovery ends. In a myriad of procedural settings, the basic result achieved in the *Devex-General Motors* litigation is effected.

A. Pre-Judgment Interest

When fact-finding determinations are made in federal question cases, federal common law provides the standards and criteria to be applied so that those determinations can be expressed appropriately in present value amounts. For some federal question claims, statutes prescribe the addition of pre-judgment interest but no statute broadly addresses pre-judgment interest in federal question litigation.

Private antitrust litigation, for example, has been governed by common-law doctrines regarding pre-judgment interest. Pre-judgment interest was not allowed in treble damage actions

instituted before 1980, but the Clayton Act now allows pre-judgment interest on actual damages if the court finds that defendant or its counsel engaged in dilatory tactics. 15 U.S.C. §15(a) (1982). Interest on the full amount of the trebled damages is recoverable under the law concerning interest on judgments.

B. Interest on Judgments

(1) Statutory and Rule Provisions

A broadly applicable federal statute addresses the recovery of interest on judgments in all federal question cases. The federal statute, found in §1961 of the Judicial Code, is supplemented by a provision of the Federal Rules of Appellate Procedure, Rule 37, which illuminates the nature of the statutory remedy and addresses the relationship of trial and appellate courts in the implementation of the award of interest on judgments.

The statutory provision, 28 U.S.C. §1961 (1982), provides in pertinent part:

§1961. Interest

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.

As amended in 1982,[9] this provision responds to the dynamic nature of the time value of money in the marketplace. A flexible rate, ascertainable month by month in accordance with a specified kind of market transaction, assures that rates for interest on judgments reflect changes in time value of money. Congress was very conservative in its choice of the index transaction-type: short-term borrowings by the most creditworthy of all debtors, the United States Government. The Government invariably pays less than other borrowers for the use of money. Section 1961 thus assesses interest on judgments at rates probably below the marketplace rates that would be found in loans to ordinary private business entities.

The statute reflects the marketplace by providing for compounding of interest. Again, the congressional choice was a conservative one. In the marketplace, interest on private loans is compounded at least on a monthly, and often on a daily basis. Under §1961, a judgment fully paid within a year bears only simple interest. Annual compounding thereafter is favorable to judgment debtors.[10]

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9. The Judicial Code provision for interest on judgments can be traced to 1842, when Congress first declared that "interest shall be allowed on all judgments in civil causes." 5 Stat. 518. The 1842 statute indexed the recovery of interest on judgments in federal courts to the rate allowed under the laws of the various states in which the federal courts were located. The original statute was carried forward through various revisions of the Judicial Code. *See, e.g.*, Revised Statutes §966 (1873); 28 U.S.C. §811 (1940). In April 1982, Congress adopted the current version, 28 U.S.C. §1961 (1982). Pub. L. No. 97-164, Title III, §302(a) 96 Stat. 55 (1982).

10. The Director of the Administrative Office of the United States Courts, complying with the instructions in §1961, distributed a series of notices on the enforcement of that section. Copies are attached as an appendix to this paper.

In addition to setting rates of interest on judgments by reference to marketplace rates, the 1982 amendment established a remedy to be applied uniformly across the country. Prior to 1982, federal statutes on judgment interest incorporated by reference rates of interest established by state law in the respective states in which federal courts were located. State legislatures had responded to the precipitous rise in time value of money in different ways and at different times. The sharp divergence of interest rates thereby incorporated into federal law[11] was a major reason for amendment of §1961.[12]

Rule 37 of the Federal Rules of Appellate Procedure, adopted in 1967, elaborates on the remedy declared in §1961. The rule comes into play only when civil cases involving money judgments have been decided by a court of appeals, but the issues of interest on judgments frequently arise in that setting. The rule provides in its entirety:

> Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

A comparable rule is found in the Rules of the Supreme Court, Rule 56.

(2) Federal Remedies As Applied in Cases That Move Promptly to Judgment Day

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11. Within the Third Circuit, for example, Delaware amended its provision for judgment interest in 1980 to set a rate interest 5% over the Federal Reserve discount rate, including any surcharge, as of the time from which interest is due. DEL. CODE ANN. tit. 6, §2301(a) (Supp. 1984). In the *Devex-General Motors* litigation, the judgment interest rate under the formula was 16%. Pennsylvania, on the other hand, allows interest on judgments at the rate of 6%. 41 PA. CONS. STAT. §§201, 202 (Supp. 1986); 42 PA. CONS. STAT. §8101 (1982). The Pennsylvania rate of interest has been unchanged since 1723. *See* Note, *The Post-Judgment Interest Rate in Pennsylvania: Ignoring Reality Too Long*, 23 DUQUESNE L. REV. 1083 (1984).

12. *See* notes 44 and 45 *infra*.

The application of §1961 to an ordinary case, one not complicated by significant delay after the fact-finding decision, is quite straightforward. An appropriate pre-judgment interest award is incorporated into the verdict or finding at the conclusion of the evidentiary hearing. A district court judgment is entered forthwith.[13] The judgment declares formally the amount defendant is obligated to pay. The judgment becomes enforceable by execution after ten days.[14] During that ten-day period, and thereafter until the judgment is paid, interest on the amount of the judgment accrues under §1961.

The remedial scheme is of such clarity on the face of the statute that no additional interpretation is required in cases that follow the simple model. This basic model reveals how the law achieves the underlying remedial objective. The outcome effects the restitutionary purpose of taking account of the time value of money for the period between ripening of a plaintiff's claim and arrival of the day when that claim is paid.

III. APPLICATION OF FEDERAL REMEDIES IN CASES OF EXTENDED DURATION

In much litigation, cases are far from ended when jury verdicts are returned or court findings are made. As the course of litigation stretches out from that point, putting off entry of the ultimate final judgment, the question arises of the remedy for the time value of money during the time consumed by further litigation. The most frequent cause of lapse of substantial time is the slow cadence of appellate review. Appellate process unfolds in stages of considerable length even if only one level of appeal is involved. Should Supreme Court intervention be sought, many years elapse between verdict or finding and ultimate final judgment. Even without any appeal, proceedings after verdict or finding in a district court may result in a gap between the fact-finder's determination and the trial court's judgment.

The central question is the nature and extent of the remedy under §1961, illuminated by Appellate Rule 37, for the time

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13. *See* FED. R. CIV. P. 58

14. FED R. CIV. P. 62

value of money gained and lost during an extended period of litigation after verdict or finding. The issues arise, of course, only if a plaintiff—at the end of the whole process—is held to be entitled to a money judgment. Once the ultimate judgment is entered, a plaintiff is entitled to interest on the amount of that judgment until it is paid. The question posed here is whether plaintiff is also entitled to adjustment of the amount of that judgment for the period from the fact-finder's determination, by verdict or finding, to the ultimate judgment. Does interest accumulate for the time that elapses as district court proceedings go forward and appeals run their course?

The restitution principle provides an unequivocal affirmative answer to the question. After the fact-finding inquiry closes, the amount of a plaintiff's merits-claim is fixed. Further lapse of time before payment results in defendant being enriched while plaintiff incurs loss measured by the time value of the money. The only remedy for this period is interest on the judgment. The question of a remedy for the period between a fact-finding determination and the ultimate judgment is, in theory, present in every case. In one simple model, when a district court's final judgment follows immediately after verdict and no appeal is taken, there may be no gap at all. As litigation becomes more complex, however, the time periods grow and the amounts of money at stake become more than *de minimis*. In extended cases, the amounts of interest for this period may eclipse the amount of a plaintiff's underlying claim. This part of the paper addresses the extended case, the cases where the greatest adjustments may be required.

The prototypical extended case is one in which a plaintiff reaches an ultimate legal victory on the merits-claim (a) when a court of appeals affirms a lower court judgment for money, or (b) when a court of appeals vacates an erroneous trial court judgment and instructs the trial court to enter a new money judgment for plaintiff. Most of the cases that have presented issues of the remedy for extended litigation are based upon the delays inherent in appellate review. Some cases, however, become extended in the district courts, when post-trial motions remain open for decision for substantial periods of time. The

most protracted cases are those that combine lengthy appellate review with lengthy trial court consideration of post-trial motions.

In federal court, extended litigation poses three questions of construction of §1961 and appellate Rule 37.

(a) Section 1961 provides that interst be "allowed on a money judgment." In extended litigation, which judgment determines that interest is to be allowed?

(b) For what period of time is interest to be allowed? Does the statute allow the period to begin before the controlling judgment is entered?

(c) What is the rate of interest used where the period of interest accrual begins before the controlling judgment?

The first two questions, which are interrelated, are addressed in Part A. Part B considers the question of the rate of interest to be applied.

A. "Allowance" of Interest: Time Periods Covered

(1) Power to Allow Interest: The Statute and Rule

The language of §1961 is not free from ambiguity, but the statute, construed in light of Rule 37 and its manifest remedial purpose, clearly allows plaintiffs who ultimately prevail in actions for money judgments to recover interest on those judgments for time consumed during extended litigation.

In extended litigation, inevitably multiple judgments are entered. Section 1961 does not, on its surface, speak clearly to the question of interest when more than one judgment has been entered in a case. Earlier judgments of a district court are superseded by later judgments of that court. Judgments of appellate courts, affirming, reversing, or modifying district court judgments, add to the sequence of judgments. As cases move from stage to stage, past judgments no longer have force and effect. Well-defined procedural law deals with the suspension and vacation of prior judgments as litigation moves along.[15]

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15. Pending a final outcome, execution of a judgment not vacated can be and normally is stayed as litigation proceeds. *See* FED. R. CIV. P. 62; FED. R. APP. P. 8

Which of the several judgments entered during the course of extended litigation triggers the operation of §1961?

The statute declares that interest shall be allowed "on any money judgment in a civil case recovered in a district court" and that "such interest shall be calculated from the date of the entry of the judgment." In the context of extended litigation, the judgment signified by "any money judgment" is a judgment at the conclusion of the litigation. Until all questions as to defendant's liability on the merits-claim, or as to the amount to be recovered on that claim, have been resolved, a "correct" judgment for the proper amount against the proper defendant may not ever have been entered in any court. All intermediate judgments may have been infected by some error. Intermediate judgments are not final in the sense that execution of those judgments is timely. While extended litigation moves along, earlier judgments are changed, vacated, or superseded by later judgments. Until no further changes in the underlying merits-claim issues are expected, it is premature to consider adding interest on any judgment.

Rule 37 of the Rules of Appellate Procedure confirms that the ultimate judgment of a court of appeals, at the end of litigation prolonged by appeal, controls the allowance of interest. Prior to adoption of the Rules, failure of a court of appeals to include instructions as to interest in its mandate was tantamount to denial of interest on the judgment to the date of the appellate court's judgment. *See, e.g.*, Note, *Interest on Judgments in the Federal Courts*, 64 YALE L.J. 1019 (1955). Rule 37, adopted in 1967, corrected perceived problems in that body of decisions.

The first sentence of Rule 37, dealing with a court of appeals' affirmance of a district court judgment for money, provides for inclusion of interest during the period of appeal. The Advisory Committee's Notes state that the first sentence is intended to clarify "some confusion on this point" in prior cases.[16] The substance of the first sentence is a standing term,

16. For a more extensive discussion of the confusion among the courts, *see* Note, 64 YALE L.J. 1019, 1022-1029 (1955).

incorporated into every mandate in cases of this nature, directing that interest be allowed for a period prior to the court of appeals' judgment.

The second sentence applies whenever a district court judgment is modified or reversed with a direction that a money judgment be entered. In this procedural setting, the Rule requires, in every case, that the court of appeals issue instructions with respect to allowance of interest for the preceding period of time. In 1948, the Supreme Court had held that where a court of appeals' mandate made no mention of interest for the period of the appeal, even though plaintiff prevailed on appeal, the district court was powerless to add interest for that time. *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 68 S. Ct. 1039, 92 L. Ed. 1403 (1948). The Advisory Committee Notes to Rule 37 state that the second sentence is "a reminder" of the *Briggs* rule so that courts of appeals will not be silent, but will rather overtly instruct district courts with respect to interest.

Rule 37, in both sentences, confirms that the controlling judgment which confers the corollary remedy of interest for successful plaintiffs, is the judgment of the appellate court bringing the litigation to a close.

In addition to identifying the controlling judment on which interest is allowed under §1961 (and the controlling court), the Rule indisputably indicates that the proper period of interest antedates that controlling judgment. When a district court's money judgment is affirmed on appeal, the first sentence of the Rule provides that interest be allowed from the date of the judgment in the court below being sustained. When a district court's judgment is modified or reversed with direction to enter a money judgment, the Advisory Committee's Notes explain that the court of appeals must instruct the district court regarding interest for the period of appeal from the erroneous ruling of the court below:

> In reversing or modifying the judgment of the district court, the court of appeals may direct the entry of a money judgment, as, for example, when the court of appeals reverses a judgment notwithstanding the verdict and directs entry of judgment on the verdict. In such a case the

question may arise as to whether interest is to run from the date of entry of the judgment directed by the court of appeals or from the date on which the judgment would have been entered in the district court except for the erroneous ruling corrected on appeal.

The Advisory Committee's explanation of the Rule refers explicitly to allowance of interest from the date on which a correct district court judgment should have been entered.

This result has been reached by some federal courts by "equitable construction" of §1961.[17] What these courts mean, it appears, is that the "date of the entry of judgment," from which interest begins to accrue, is that date on which a correct trial court judgment should have been entered. The same result could be reached by interpretation of the statute to give effect to its manifest purpose.[18]

(2) Federal Case Law Interpreting the Statute and Rule

(a) *Cases Extended by Appeals*

We turn next to the body of precedents in extended litigation where the issue has arisen regarding a remedy for

17. The general principle of "equitable construction" of the statute is traced to a decision of the Supreme Court more than a century ago. National Bank v. Mechanics' National Bank, 94 U.S. 437, 24 L. Ed. 176 (1877).

Courts have not considered, apparently, an alternative rationale that recovery of interest for the period between the initial decision by a trial court and the ultimate judgment could be characterized as pre-judgment interest, recoverable without reference to §1961.

18. Courts that have relied upon the principle of "equitable construction" of §1961 appear to have been concerned with construction of the third sentence, which provides that interest "shall be calculated from the date of entry of judgment." A superficial reading of "from" would limit interest on judgments to periods after judgments. The "equitable construction" assumes a correct judgment to have been entered on the date that, in the court's view, interest should begin to accrue. One could arrive at the same conclusion by a less superficial reading of "from." Interest on a judgment is a corollary remedy incident to the ultimate merits-claim determination that a plaintiff is entitled to a sum of money. An interest calculation "from" that point could look backward as well as forward.

the time value of money for the period of the litigation after verdict or finding.

All of the federal courts that have decided the issue have construed §1961 and Rule 37 to mean, in extended cases, that the controlling judgment bringing the controversy over the merits-claim to a close is the judgment that establishes the plaintiff's right to interest on the judgment and that the allowable period of interest under §1961 begins before that controlling judgment has been entered.[19]

Federal courts have applied the remedy of judgment interest to varying periods of time so that this remedy extends back to the dates when no further adjustments for time value of money were made on the amounts to be recovered on the merits-claims.

The most considered opinion evaluating plaintiffs' recovery of interest on a judgment is that of the Ninth Circuit in a 1983 case. The Court of Appeals reversed a trial court judgment

19. Case law on these points exists only in decisions of courts of appeals and district courts. The Supreme Court's views are indicated by its promulgation of Federal Rule of Appellate Procedure 37. The Supreme Court granted certiorari to take up the question in Briggs v. Pennsylvania R. Co., 334 U.S. 304, 68 S. Ct. 1039, 92 L. Ed. 1403 (1948). The Court disposed of that case, however, without reaching the question of interpretation of §966 of the Revised Statutes, the predecessor of §1961. The Supreme Court decision went off on the ground that the district court was powerless to add interest on a judgment when the court of appeals, reversing the district court's initial ruling that it lacked jurisdiction, ordered reinstatement of the amount of plaintiff's claim found by jury verdict but did not mention interest in the mandate.

The so-called *Briggs* rule, allocating exclusive power to the court of appeals to allow interest for the period between an erroneous district court decision and the appellate court's reversal, has been incorporated into Fed. R. App. P. 37. The rule requires courts of appeals to make explicit their decisions regarding interest in their mandates to the courts below. Omissions of this interest term may be corrected by timely motions for amendment of the mandate. *E.g.*, Reaves v. Ole Man River Towing, Inc., 761 F.2d 1111 (5th Cir. 1985). Occasionally, a motion to recall a mandate is rejected as untimely. *See, e.g.*, Lee v. Terminal Transport Co., 301 F.2d 234 (7th Cir. 1962); Riha v. International Telephone & Telegraph Corp., 533 F.2d 1053 (8th Cir. 1976); Alexander v. National Farmers' Organization, 614 F. Supp. 745 (W.D. Mo. 1985).

n.o.v. for defendants, and went on to consider the effect of that reversal on plaintiff's right to interest. Holding that interest on the judgment should be allowed from the date of the verdict, the court's reasoning was as follows:

> The purpose of awarding interest to a party recovering a money judgment is, of course, to compensate the wronged person for being deprived of the monetary value of the loss from the time of the loss to the payment of the money judgment.
>
> * * *
>
> A jury verdict or trial court decision in favor of plaintiff should ordinarily include, as part of the damages award, interest on the monetary loss resulting from the breach or injury from the date of breach or injury to the date of ascertainment of damages, whether such interest be denominated prejudgment interest or interest by way of damages. Where judgment is entered promptly on the verdict, section 1961 ensures that the plaintiff is further compensated for being deprived of the monetary value of the loss from the date of ascertainment of damages until payment by defendant.
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> * * *
>
> Where, as here, the initial ascertainment of damages is left standing but a delay occurs between the date of that ascertainment and the date of the eventual entry of judgment based on that ascertainment, the result should not differ. The real issue lurking behind the proper interpretation of section 1961 is, regardless of why a delay exists between the verdict and the entry of judgment based on that verdict, "who should bear the cost resulting from the loss of the use of money."
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> * * *
>
> It would be anomalous to read section 1961 so narrowly that the cost of delay in payment is imposed on a successful plaintiff. We adopt the equitable construction of section

> 1961 suggested by the Supreme Court in *Mechanics' National Bank* [94 U.S. 437 (1876)] and enunciated by the Fifth Circuit in *Pratt* [142 F.2d 849 (5th Cir. (1944))] and its progeny and accordingly hold that plaintiff is allowed interest under Section 1961 from October 6, 1978 [the date of the verdict] until paid.

Turner v. Japan Lines, Ltd., 702 F.2d 752, 756-757 (9th Cir. 1983).[20] The cases allowing interest for the period of extended litigation can be classified into three categories:

First are the cases in which the amount of a defendant's potential liability was settled by verdict or other fact-finding decision and, thereafter, litigation continued to resolve controversy as to defendant's liability. When it was ultimately determined that defendant was liable, the amount of recovery was the amount established in the earlier verdict or judicial fact-finding decision.

Second are the cases in which the amount of a plaintiff's recovery continued in controversy after a judicial determination established defendant's liability. Ultimate resolution of the amount of recovery entailed molding of an earlier verdict or court-finding or use of evidence compiled for that earlier fact-finding inquiry. The common thread in these cases is use of

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20. *Turner* was the culmination of a series of decisions in which the Ninth Circuit interpreted §1961 to take account of the sharp rise in the time value of money. Twenty years earlier, in an extended case, the District Court found for the United States in an action under the Surplus Property Act and awarded $8,000. The Government successfully appealed, establishing the right to recover $159,000. The Government sought interest on the judgment in that amount for a period beginning with the date of the trial court's erroneous award. The District Court refused and the Court of Appeals affirmed. United States v. Hougham, 301 F.2d 133 (9th Cir. 1962). The Court of Appeals recognized that the Government had been deprived of the time value of the money for over four years, but denied relief with the laconic explanation: "The law is not perfect." 301 F.2d at 135. The 1983 opinion in *Turner* describes the *Hougham* opinion as having indicated a preference for "narrow interpretation" of §1961, a preference described as dictum and gently laid aside. 702 F.2d at 755 n.3. The Court of Appeals interred *Hougham* again the following year. Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282, 1299 n.27 (9th Cir. 1984), *cert denied*, _____ U.S._____, 105 S. Ct. 963 (1985).

a measure of the amount of recovery that did not take into account the time value of money associated with the period of extended litigation.

Third are cases in which both defendant's liability and the amount of recovery were controverted through extended litigation with an ultimate conclusion, favorable to plaintiff, measured by factual evidence that did not take into account the time value of money associated with the period of extended litigation. The third category could be considered a variation of the second, in that defendant's liability, while reconsidered, had been substantially established by an earlier judicial determination.

As we shall see, federal courts have concluded generally that interest on judgments should accrue during the period of extended litigation from the date of a significant determination of the amount of recovery or the date on which liability was established or substantially established, if, and this is the critical element, the ultimate judgment does not take into account the time value of money associated with the period of extended litigation in fixing the amount of plaintiffs' recoveries. Not all decisions fit under this broad principle of restitution. The bulk of the litigation has occurred in recent years, as the significance of time value of money become more evident to the parties and to the courts. The most well-considered opinions are entirely from the past fifteen years.

(i) Merits-Claim Liability Established After the Amount of Recovery Had Been Settled

The *Turner* case illustrates one common variant of the pattern of extended litigation in which controversy as to defendant's liability on the merits continued after the amount of potential liability had been settled. The District Court granted judgment n.o.v. for a defendant, an erroneous judgment of non-liability ultimately reversed by the Court of Appeals.

The same pattern exists when a district court enters judgment for plaintiff, defendant appeals, and the trial court judgment is affirmed. The amount of recovery on the merits-claim remains fixed while the defendant's appeal is pending. Adjustment of that amount for the time value of money associated with

the period of appeal can be effected only by allowance of interest on the ultimate judgment from the date of the trial court's earlier decision. The *Devex-General Motors* case illustrates this pattern. The compelling reason to allow interest on a judgment to adjust for benefits and losses on pending appeals, as a matter of restitution, is obvious in this pattern.[21] The first sentence of Appellate Rule 37 explicitly allows interest in every case of this kind. *See also Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 746 F.2d 168 (2d Cir. 1984).[22]

Apart from the essentially non-controversial category of cases of appellate court affirmances of trial court judgments for

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21. In some cases, courts of appeals have characterized their actions as "substantial affirmances" of lower court judgments as a reason for granting interest on the periods of time involved in the appeals. *E.g.*, Brooks v. United States, 757 F.2d 734 (5th Cir. 1985); United States v. Michael Schiavone & Sons, Inc., 450 F.2d 875 (1st Cir. 1971). *See also* Kneeland V. American Loan & Trust Co., 138 U.S. 509, 11 S. Ct. 426, 34 L. Ed. 1052 (1891). In *Brooks*, the interest recovery was sought against the United States. Prior to the 1982 amendment of 28 U.S.C. §1961, interest recoveries in suits against the United States were dealt with in other statutes. The law in question in *Brooks*, 31 U.S.C. §1304(b)(1)(A), defined the right to recover and the period for which interest was recoverable in language different from that of §1961. A "substantial affirmance" characterization aided in construction of § 1304(b)(1)(A) to allow interest. In cases governed by §1961 and Rule 37 of the Appellate Rules, a "substantial affirmance" characterization would allow invocation of the first sentence of Rule 37, which might avoid procedual probiems under the *Briggs* rule when a court of appeals' mandate had contained no instruction as to interest. Plainly Rule 37's second sentence contemplates allowance of interest when judgments of lower courts have been reversed or modified, whether or not the judgments of the lower courts have been substantially affirmed.

In what Learned Hand described as a "peculiarity of admiralty practice," when a claimant took an appeal from a judgment in his or her favor, no interest would accrue during the pendency of the appeal if the court of appeals affirmed the judgment of the district court. Lauro v. United States, 168 F.2d 714, 716 (2d Cir. 1948). The first sentence of Appellate Rule 37 does not differentiate between defendants' and plaintiffs' appeals. The Second Circuit acknowledged the force of Appellate Rule 37, adopted in 1967, and overruled the peculiar admiralty rule. Kotsopoulos v. Asturia Shipping Co., S.A., 467 F.2d 91 (2d Cir. 1972).

22. The *Litton* case is discussed later with respect to the issue of the proper rate of interest to be applied. See pp. 32-34 *infra*.

plaintiffs, the best example of litigation in which the amount of recovery is fixed before liablity itself has been finally established is found in cases in which trial courts erroneously set aside verdicts or other fact-finding determinations that established the amount of plaintiffs' recoveries.

Turner is one of a number of court of appeals' decisions holding that interest may be allowed for the period of appeal from erroneous trial court judgments setting aside verdicts for plaintiffs and ordering judgments for defendants n.o.v. *See, e.g., Louisiana & Arkansas Ry. Co. v. Pratt,* 142 F.2d 847 (5th Cir. 1944); *Givens v. Missouri-Kansas-Texas R. Co.* 196 F.2d 905 (5th Cir. 1952); *Woods Exploration & Producing Co. v. Aluminum Co. of America,* 509 F.2d 784 (5th Cir. 1975); *Buck v. Burton,* 768 F.2d 285 (8th Cir. 1985); *Affiliated Capital Corp. v. City of Houston,* 793 F.2d 706 (5th Cir. 1986) *(en banc). And see Bell v. Westinghouse Electric Corp.,* 507 A.2d 548 (D.C. App. 1986). All of these cases, with the exception of *Affiliated Capital,* held that an interest recovery should be granted.[23]

Closely related to the procedural setting of an erroneous trial court judgment n.o.v. for defendant are those cases in which trial courts erroneously granted new trials or erroneously required plaintiff to accept a remittitur to avoid a new trial. *See, e.g., Taylor v. Washington Termianl Co.,* 308 F. Supp. 1152 (D.D.C. 1970) (erroneous order granting new trial); Fassbinder v. Pennsylvania R. Co., 233 F. Supp. 574 (W.D. Pa. 1964) (erroneous order granting new trial); *Gorsalitz v. Olin-Mathieson Chemical Corp.,* 429 F.2d 1033 (5th Cir. 1970) (erroneous requirement of remittitur). After plaintiffs had ultimately succeeded in obtaining reversals of the erroneous orders, interest was allowed from the dates of the original verdicts in all of these cases.

Sustaining of a post-trial motion under Rule 60(b) of the Federal Rules of Civil Procedure may present a comparable

23. *In Affiliated Capital,* the Fifth Circuit held that the interest remedy for the period of delay in protracted litigation was a remedy that was within the discretionary power of the courts to grant or to deny on a case-by-case evaluation. The Fifth Circuit decision is probably unique. Discussion of this aspect of *Affiliated Capital* appears at p. 27 *infra.*

issue regarding interest on a judgment. For example, a trial court set aside an award by a panel of arbitrators, erroneously ruling that the award was tainted by conflict of interest. Having earlier confirmed the award, the trial court thereafter granted a motion to set the judgment aside under Rule 60(b). The Seventh Circuit reinstated the judgment, confirming the award with interest from the date of the original judgment. *Merit Insurance Co. v. Leatherby Insurance Co.,* 728 F.2d 943 (7th Cir. 1984).

(ii) Merits-Claim Liability Established Before the Amount of Recovery was Settled

When the amount of recovery on merits-claims is a matter of extended controversy, the final resolution of the controversy often involves a court's shaping of factual matters ascertained as litigation proceeded. Various litigation devices are used in appropriate contexts to avoid the expensive and time-consuming process of *de novo* litigation of facts. As a result, the ultimate determination of the amount to be recovered may fail to take account of the time value of money associated with the litigation period following the decision establishing a defendant's liability. In these circumstances, federal courts generally allow interest on judgments back to the dates on which liability was established.

When a trial court errs only in the amount of a plaintiff's recovery on the merits-claim, it is sometimes possible, without further factual hearing, to ascertain from the trial court's original finding the amount to be added or subtracted. Two kinds of trial court error exemplify this situation. The court may determine correctly the total amount of plaintiff's loss but allocate that total incorrectly among parties to the litigation. Correction is accomplished by reallocation of the respective portions. In another setting, a trial court may erroneously include or exclude damages of a certain kind. Where the fact-finding process has already ascertained the amount of those damages, correction of the erroneous judgment is accomplished by subtracting or adding the known amount. Cases of both types exist.

In tort cases involving issues of comparative negligence or joint and several liability of multiple defendants, a district court

may err in allocating the injured person's loss among the relevant parties. In a tort case that presents an issue of comparative negligence, the district court's assessment of plaintiff's gross damages may be unassailable, but the allocation of percentages of fault may be held erroneous. Thus, in a case arising out of an airplane landing accident, the District Court originally apportioned negligence between the pilot and the Government on a 25%-75% basis. After the Court of Appeals reversed for error in the lower court's analysis, the District Court found that the Government was liable for only 60% of the loss. The trial court held further that interest on the amount of the Government's liability so found would run from the date of the earlier erroneous apportionment. The Court of Appeals for the Fifth Circuit affirmed. *Brooks v. United States,* 757 F.2d 734 (5th Cir. 1985). *See also Coyle Lines, Inc. v. United States,* 195 F.2d 737 (5th Cir. 1952).

Valuation of a plaintiff's claim below the correct amount occurs if a trial court excludes from its calculation recovery for a certain type of damages. Correction of that kind of error may not require reopening of any fact-finding inquiry. In two cases, the errors could be corrected by addition of the amounts previously determined for damages of the kind without conducting fresh factual inquiry. *See, e.g., Maxey v. Freightliner Corp.,* 727 F.2d 350 (5th Cir. 1984) (after verdict including an amount for punitive damages, district court erroneously disallowed punitive damages); *Laffey v. Northwest Airlines,* 582 F. Supp. 280 (D.D.C. 1982) (statutory double damages for violation of "Equal Pay Act" erroneously disallowed). The courts in *Maxey* and *Laffey* allowed interest on the judgments from the date of the erroneous judgments.

Valuation of a plaintiff's claim above the correct amount occurs if the trial court improperly includes in its calculation damages of a kind not recoverable. In a Ninth Circuit case, the trial court erroneously included a specified amount of damages as punitive damages. After reversal by the Court of Appeals, the District Court entered judgment for compensatory damages only and ruled that interest would run on the judgment from the

date of its original judgment. The Court of Appeals affirmed. *Lew Wenzel & Co. v. London Litho Supply Co.,* 563 F.2d 1367 (9th Cir. 1977).

When a trial court commits error as to the amount of damages and the correct amount is not ascertainable from the original fact-finding process, ordinarily the only recourse is a new trial on the issue of the amount of recovery on the merits-claim. When that trial is held, the new evidence may include pre-judgment interest, or other appropriate adjustment for time value of money, so that the second fact-finding process may take into account time value of money for the period of time since the erroneous trial court determination. If that occurs, the period of interest on the judgment properly begins at the date of the later fact determination.

The clearest example would be a case in which the district court erred in the amount of pre-judgment interest allowed. Recalculation of pre-judgment interest by the court at the proper rate and to the date of the new judgment would fully remedy the delay. So long as pre-judgment interest continues to accrue during the prolongation of litigation, the period for allowing interest on the judgment under §1961 does not commence. *See Ashland Oil, Inc. v. Phillips Petroleum Co.,* 607 F.2d 335 (10th Cir. 1979), *cert. denied,* 446 U.S. 936 (1980); *Chemical Bank & Trust Co. v. Prudence-Bonds Corp.,* 213 F.2d 443 (2d Cir. 1954).[24]

When a trial court errs only as to the amount of a plaintiff's recovery on the underlying merits-claim and a new trial or other proceeding is required to ascertain the correct amount of the recovery, but the new trial or other proceeding measures the recovery without taking into account lapse of time since the original fact-finding decision, courts tend to allow interest on the judgments to accrue from the dates on which the trial courts found defendants liable, even though the proper amount of

24. *But see* Peterson v. Crown Financial Corp., 553 F. Supp. 114 (E.D. Pa. 1982) (trial court held to have erred in setting rate of pre-judgment interest: on remand, court corrected error but allowed pre-judgment interest only to the date of the original judgment with interest on the judgment thereafter).

recovery was not ascertained until later. In this group of cases, although liability is fixed earlier, the amount of ultimate recovery is uncertain until the controlling judgment. In some of these cases, the amount eventually found due on the merits-claim was lower than the erroneous prior judgment. In other cases, the amount found due at the end was higher. Regardless of the direction of the change, courts with minor exception allowed interest on the judgments to begin to accrue as of the dates of the erroneous judgments.

Illustrative is an Elkins Act case in which the Court of Appeals for the First Circuit was able to modify the lower court's judgment to eliminate a portion of the damages wrongfully included by the District Court. *United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875 (1st Cir. 1971). The First Circuit ordered interest on the modified judgment to begin as of the date of the erroneous trial court judgment.

Similarly, the Court of Appeals for the Ninth Circuit reduced an award of attorneys' fees to the prevailing plaintiff in a private antitrust action, but ordered that interest on the lowered amount run from the date of the original award. *Perkins v. Standard Oil Co.*, 487 F.2d 672 (9th Cir. 1973).[25] *And see*

25. The Ninth Circuit declined to follow a 1952 decision by the Seventh Circuit, which reduced an attorneys' fees award and directed that interest on the award begin with the Court of Appeals' decision. Harris v. Chicago Great Western Ry. Co., 197 F.2d 829 (7th Cir. 1952). The Seventh Circuit's opinion reflects that court's very considerable antipathy to the claim for attorneys' fees in a shareholder derivative suit. The court said that the amount of plaintiff's request "seems to us so unreasonable as to shock the judicial conscience. . . . Indeed, the amount to which we have reduced the fees may still seem extravagant not only to the public but to other members of the bar." 197 F.2d at 836. That this attitude affected the court's decision regarding interest on the fee award cannot be established with certainty, but some relationship is likely.

In a subsequent Seventh Circuit case, a proceeding against the United States under the Tort Claims Act, the Court of Appeals held that the first trial court's determination of damages was erroneously high and directed the lower court to eliminate all elements of a certain kind of expenses from the damage calculation. In a later appeal, the Seventh Circuit held that interest on the revised judgment commenced on the date of that judgment. The decision was an interpretation of a provision of the Tort Claims Act, not of 28 U.S.C. §1961. Merchants Matrix Cut Syndicate, Inc. v. United States, 284 F.2d 456 (7th Cir. 1960).

Premier Corp. v. Serrano, 471 F. Supp. 444 (S.D. Fla. 1979).

The Sixth Circuit brought a personal injury case to a close eight years after the accident by deciding, after two prior reversals, not to remand again to a District Court which had not fully complied with the appellate court's earlier mandate. The Court of Appeals, using the record before it, made an elaborate calculation of the amount to be recovered by each of ten plaintiffs. The Court of Appeals ordered interest on these amounts to accrue from the date of the District Court's earlier erroneous judgment. *Petition of United States Steel Corp.*, 479 F.2d 489 (6th Cir.), *cert. denied*, 414 U.S. 859 (1973).

In a Fifth Circuit case, the trial court erred in setting too low an amount of attorneys' fees to be recovered by a plaintiff who had prevailed in a private antitrust action. The Court of Appeals directed the District Court to reconsider the amount. On appeal from the District Court's subsequent order increasing the amount of the fees recovery from $45,000 to $266,000, the Court of Appeals ordered that interest accrue on the increased amount from the date of the erroneous award. *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir. 1983) (*en banc*).[26]

A similar result was reached in a suit against the United States under the Public Vessels Act. A series of erroneous determinations of the amount of plaintiff's claim, with ensuing appeals, resulted in substantial delay before the case was brought to a close in 1974. The District Court then held that interest on that amount should accrue from 1968:

> The fact that this court has been unable to compute damages satisfactorily and that our decisions have been reversed and remanded twice should not work to plaintiff's detriment. She became entitled to interest as of the day the final judgment on liability was rendered, and it would be

26. Portions of the increased amount of attorneys' fees were compensation for services involved in the appeal from the District Court's erroneous award. The Court of Appeals held that the period of interest on these sums did not relate back to the date of the original award.

inequitable to impose the costs associated with the use of money on her rather than on the defendant whose wrongful conduct resulted in the invocation of the judicial process and who had use of the money during the pendency of the various appeals.

Mascuilli v. United States, 383 F. Supp. 50, 53 (E.D. Pa. 1974), *aff'd without opinion*, 519 F.2d 1398 (3d Cir. 1975).[27] Interest was thus allowed for a substantial period of time during which the correct amount of the judgment was not yet known. Search for the correct amount did not entail adding pre-judgment interest. The court decided that the period of the restitution remedy began when defendant's liability was established even though the amount of damages was not made certain until later.

Mascuilli and *Copper Liquor* contrast with a personal injury case in the Eighth Circuit. A bench trial concluded with judgment for plaintiffs. The Court of Appeals affirmed as to liability, but held that the trial judge's findings as to damages were insufficient under Fed. R. Civ. P. 52(a). On remand, the District Court made explicit findings and entered a new judgment in the same amounts of its original judgment. The Court of Appeals held that judgment interest accrued only from the date of the second judgment. *Hysell v. Iowa Public Service Co.*, 559 F.2d 468 (8th Cir. 1977). The only authority relied upon by the Court of Appeals was one prior case in which plaintiff had failed to get an Appellate Rule 37 mandate regarding interest and a request for recall of the mandate was no longer timely. *Riha v. International Telephone & Telegraph Corp.*, 533 F.2d 1053 (8th Cir. 1976).[28]

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27. The *Mascuilli* court applied a provision of the Public Vessels Act for interest on judgments, but the court's rationale equally fits cases governed by §1961.

28. *Hysell* was not cited by the Eighth Circuit in its 1985 decision embracing the principle of restitution as applied to interest on judgments in extended litigation. Buc v. Burton, 768 F.2d 285 (8th Cir. 1985). *And see* Premier Corp. v. Serrano, 471 F. Supp. 444 (S.D. Fla. 1979).

A 1962 decision in the Ninth Circuit allowed interest from the second determination of the amount of plaintiff's recovery. In that case the trial court had initially awarded damages to the United States of $8,000, but the

(iii) Merits-Claim Liability and Amount of Recovery Reconsidered

In a number of cases, after trial courts had found defendants liable on the merits-claims, appellate courts found errors in these findings that required further proceedings in the trial courts with regard to liability and those further proceedings involved redetermination of the amount of recovery as well. In these cases, the question of liability was again decided against defendants. However, the amounts of recovery were based upon the evidence relied upon in the original proceeding. Thus, no adjustment was possible for the time value of money associated with the time of appeal and retrial. In these circumstances, in three cases, the Court of Appeals for the Ninth Circuit held that interest on the later judgments would begin to accrue at the time of the original, erroneous decisions. All three cases were private antitrust actions.

In two of these extended cases, the amount of damages eventually found in the second bench trials were the same in nominal dollars as the damages found in the original trials. A statute of limitations issue was involved in the first of these cases. A Supreme Court decision resolved that issue in a way that required the case to be tried again. Plaintiffs again recovered. The amount of the damages found in the second trial was the same as in the first trial. In the second case, the District Court retried the case on its merits because an erroneous definition of the relevant market had been used in the first trial. Again, plaintiffs prevailed on the merits of the antitrust case, and again there was no change in the amount of damages. In both cases, the Ninth Circuit held that interest under §1961 would run from the dates of the original District Court judgments. *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980); *Twin City Sportservice, Inc.*

Government established on appeal that it was entitled to recovery of $159,000. United States v. Hougham, 301 F.2d 133 (9th Cir. 1962). While never overruling *Hougham*, the Ninth Circuit has entirely disavowed the "narrow interpretation" of §1961 that underlay the 1962 decision. See text and note at n.20 *supra*.

v. Charles O. Finley & Co., 676 F.2d 1291 (9th Cir.), *cert denied*, 459 U.S. 1009 (1982).

The third of the Ninth Circuit's major cases requiring retrial did result in a change in the amount of plaintiffs' recovery. Unlike *Mt. Hood Stages* and *Twin City Sportservice*, this case involved a jury trial. The first judgment, based on the first verdict, was vacated on appeal for error in the jury instructions on the burden of proof of wrongful conduct and on the scope of recoverable losses in antitrust litigation. The second verdict, also for plaintiff, was substantially higher in amount than the first. Trebled, the initial verdict was $6.219 million, whereas the second verdict, trebled, was $10.762 million. The Ninth Circuit found that the higher verdict of the second jury was not based on the jury's having considered the time value of money between the first and second verdicts. Therefore, the court concluded, it was proper to take account of the time value of money for that period by allowing interest on the amount of the original judgment. The Ninth Circuit held that plaintiff should receive interest under §1961 on the $6.219 million for the six-year period between the two verdicts. Thereafter, the court held, interest under §1961 ran on the higher amount of the second verdict plus attorneys' fees. *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282 (9th Cir. 1984).

The Ninth Circuit's decision in *Handgards* is sound in its conclusion that the period of judgment interest should begin as of the date of the original verdict, but the principal sum for the entire period of judgment interest should have been the amount of the second verdict. Both juries found defendant liable for violating antitrust law. The different burden of proof did not alter the conclusion in the first trial. In this sense, as in *Mt. Hood Stages* and in *Twin City Sportservice*, the second verdict confirmed the liability conclusion in the first verdict. However, in *Handgards* defendant argued successfully that the amount of recovery in the first verdict had been incorrect. That verdict was vacated and the issue of amount of recovery was retried to a new jury. Only the second verdict was unassailable as to the amount of plaintiff's recovery. Since the retrial did not include adjustment for the time value of money or the interval between the

first verdict and the second, the better conclusion would use the amount of the second verdict as the principal sum for calculation of interest on the judgment.[29]

The modern decisions discussed above provide overwhelming authority for the conclusion that, in litigation extended by appeals, federal courts have the power to provide a remedy for the time value of money associated with delay in such litigation running its course. A different view was espoused, some thirty years ago, by the Court of Appeals for the Second Circuit. That court concluded that the "equitable construction" of §1961, whereby interest on a judgment was allowed for a period before entry of the controlling judgment, was an erroneous reading of the statute. The Second Circuit so held in 1947 and, again, in 1958. *Briggs v. Pennsylvania R. Co.*, 164 F.2d 21 (2d Cir. 1947); *Powers v. N.Y. Central R. Co.*, 251 F.2d 813 (2d Cir. 1958) (erroneous trial court decision granting judgment n.o.v. for defendant).[30]

The Second Circuit has not spoken on the question since the adoption in 1967 of Rule 37 of the Federal Rules of Appellate Procedure. The Rule requires an appellate court, in a case like *Powers*, to include in the mandate a term expressly deciding whether or not interest is to be allowed for the time the case had been pending on appeal. A requirement that courts of appeals be explicit on the issue makes sense only if the courts have

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29. It does not appear that plaintiff sought recovery of judgment interest on this principle in the District Court. *See* Handgards, Inc. v. Ethicon, Inc., 552 F. Supp. 820 (N.D. Cal. 1982) *aff'd*, 743 F.2d 1282 (1984), *cert. denied*, _____ U.S. _____, 105 S. Ct. 963 (1985). Only the defendant appealed to the Court of Appeals. The appellate court, therefore, had no occasion to consider the correct principal amount to be used for the interval between the two verdicts. The Court of Appeals satisfied itself that the second verdict was not based on any evidence related to the period after the first trial and, on the basis, affirmed the District Court's decision.

30. A direct conflict between the Second Circuit and the Fifth Circuit emerged when the Second Circuit decided the *Briggs* case in 1948. The Supreme Court granted certiorari to resolve the conflict, but decided the case without reaching the question of the proper interpretation of the statute providing for interest on judgments. Briggs v. Pennsylvania R. Co., 334 U.S. 304, 68 S. Ct. 1039, 92 L. Ed. 1403 (1948).

statutory authority to allow interest to plaintiffs in this circumstance. The Second Circuit is unlikely to adhere to its idiosyncratic view of §1961 in light of Rule 37. *See Kotsopoulos v. Asturia Shipping Co., S.A.*, 467 F.2d 91 (2d Cir. 1972) (court applied Rule 37 to overrule its prior precedents regarding interest on judgments in admiralty actions).

It is fair to say, therefore, that it is generally settled law in federal courts, under §1961, that in cases extended by appeals, interest on money judgments may be allowed for the periods of the appeals and should be allowed if the amounts to be recovered in the ultimate judgments have not been adjusted to take account of the time value of money associated with the periods of the appeals.

(b) Cases Extended By Post-Verdict Or Post-Finding Proceedings In District Courts

Only a few federal cases have considered the effect of extended trial court proceedings on the issue of interest on money judgments. The quality of the analysis in those few cases has been less than satisfactory. The restitution principle that was given force in cases extended by appeals is equally applicable in cases extended by the time required for district courts to resolve the questions presented by post-verdict or post-finding motions. In cases extended by appeals, the decisions that begin accrual of interest on the judgments from the dates of the verdicts or findings include periods of appellate review as well as periods of post-verdict or post-finding deliberations by trial courts. When lapse of time has resulted from extended trial court proceedings without further delay from appeals, the few decided cases have not always perceived that this type of delay enriches a defendant and causes a plaintiff reciprocal loss.

One case to do so involved a considerable gap between court-finding and entry of judgment due to apparent oversight by the court clerk. The remedial consequence of this inadvertent failure to enter a judgment into the formal record was the subject of a 1984 decision by the Court of Appeals for the Eighth Circuit. In a non-jury trial on a claimed overdue promissory note, the District Court had found for plaintiff. The court's

order, on May 10, 1983, did not appear in the formal record as a judgment until March 17, 1984. The Court of Appeals held that interest on the judgment began to accrue in May 1983 when the judgment ought to have been entered. The Eighth Circuit adopted the rationale of cases allowing plaintiffs relief where appellate review postpones entry of the final judgment: §1961 should be interpreted so that costs resulting from the loss of use of money are not imposed on prevailing plaintiffs. *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Knudsen*, 749 F.2d 496 (8th Cir. 1984).

The Eighth Circuit decision is fully consistent in rationale and result with the decisions allowing recovery of interest for cases extended by appeals. In several other cases, however, the question of whether to allow interest in cases extended by trial court proceedings has been framed in an inappropriate manner.

A 1972 case addressed the effect of time that elapsed after a jury verdict as the district court resolved certain questions left open by the verdict. A judgment for plaintiff, based on the verdict, was not entered until six weeks later. Plaintiff sought interest, characterized as pre-judgment interest, for the six-week period. The Court of Appeals for the Fifth Circuit stated that six weeks was not an unreasonable time for the trial court's consideration of the issues still before it when the verdict was accepted. Relief was denied. *Barrios v. Louisiana Construction Materials Co.*, 465 F.2d 1157 (5th Cir. 1972).

Under the reasoning in *Barrios*, allowance of post-verdict interest turns upon characterization of the time taken by a trial judge in deliberating upon motions or other matters that must be decided before that court enters its final judgment. To put the question in terms of dilatoriness of the court is unsound. Defendant's benefit and plaintiff"s loss of the time value of money occur whether the trial judge acts with dispatch or otherwise. To make a plaintiff's right to interest or a defendant's obligation to pay turn on the nature of a trial judge's actions is, to say the least, unseemly. In cases extended by appeals, allowance of interest never depends upon inquiry into how efficiently the court of appeals handles the business of the court. No such standard should be considered when the passage of

time results from a trial court's having had post-verdict motions, or other matters, under advisement. Interest on the controlling judgment, when it is entered, should run from the date of the verdict.

Prior to 1972, courts that addressed the issue of interest for periods of post-verdict proceedings in district courts characterized the question as a mechanical function determined by the formal act of entry of a judgment. Some have focused on the procedural distinction between a clerk-entered judgment under FED. R. CIV. P. 58 and a court-ordered judgment under FED. R. CIV. P. 54. Others have considered the procedural effects with respect to enforcement of a judgment that flow from the filing of motions for new trial or judgment notwithstanding the verdict. Sometimes the issue has been put in terms of finality of a judgment for purposes of appeal. The unstated premise in opinions of this set of cases is that the period of interest under §1961 must come after the date of entry of a judgment.[31]

The analytic weakness of the doctrine followed in these older cases is demonstrated by two more recent decisions, which ought to have been decided alike, but which came to opposite conclusions because the courts relied on FED. R. CIV. P. 54(b) to determine whether interest should have been allowed for periods of extended proceedings in trial courts after verdict.

In the first case, a private antitrust case, the Court of Appeals for the Seventh Circuit concluded that interest should be allowed for a 20-month period between verdict for money damages and trial court judgment. During that period, the District Court considered and denied defendant's motions for

31. *See, e.g.,* Murphy v. Lehigh Valley R. Co., 158 F.2d 481 (2d Cir. 1946); Christian v. Southern R. Co., 151 F. Supp. 192 (E.D.S.C. 1957); Howell v. Sinclair Refining Co., 20 F.R.D. 623 (N.D. Ala. 1957); Litwinowicz v. Weyerhaeuser Steamship Co., 185 F. Supp. 692 (E.D. Pa. 1960); Caputo v. U.S. Lines Co., 311 F.2d 413 (2d Cir.), *cert. denied,* 374 U.S. 833 (1963); Komie v. Buehler Corp. 449 F.2d 644 (9th Cir. 1971). The usual outcome of these cases was to withhold the restitution remedy for the period of post-verdict proceedings in the district courts. The *Litwinowicz* case found for plaintiff on the theory that the ultimate trial court judgment substantially affirmed the earlier clerk-entered judgment. *See* n. 21 *supra.*

new trial or judgment n.o.v. and, thereafter, considered and denied plaintiff's request for equitable relief. The District Court thereupon entered a money judgment for plaintiff in the amount of the jury verdict, trebled according to law, and denied interest on the period between verdict and judgment. The Seventh Circuit reversed. *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.,* 585 F.2d 821 (7th Cir. 1978), *cert. denied,* 440 U.S. 930 (1979).

In the second case, a personal injury case, considerable time elapsed when the District Court kept a motion for new trial or remittitur under advisement for over a year. On May 27, 1975, the jury returned a verdict for $7 million in favor of plaintiffs. On July 2, 1976, the District Court ruled that it would grant a new trial unless plaintiffs filed remittiturs for amounts in excess of $4.68 million. Plaintiffs agreed to the reduced recovery. On July 30, 1976 the court entered a judgment of $4.68 million. Plaintiffs then sought interest on the amount of the judgment, but to accrue from the date of the verdict. The District Court denied plaintiffs' request and the Court of Appeals for the District of Columbia Circuit affirmed. *Hooks v. Washington Sheraton Corp.,* 642 F.2d 614 (D.C. Cir. 1980).

Both courts of appeals deemed the controlling issue to be application of Rule 54 (b), which permits district courts to divide cases when more than one claim for relief is presented or when multiple parties are involved. The Seventh Circuit found that *Ohio-Sealy* was not subject to Rule 54(b) and, therefore, allowed interest from the date of a clerk-entered judgment at the time of the verdict. The District of Columbia Circuit held that *Hooks* was subject to Rule 54(b) because the defendant had filed third-party claims against its insurers, claims that were pending through the period between verdict and final district court judgment for plaintiff on the primary claim. A vigorous dissent in *Hooks* by Judge Mikva observed that the case was indistinguishable from *Ohio-Sealy* (642 F.2d 618, 619). The majority responded that the Seventh Circuit had also relied on Rule 54(b) but found it did not apply in that case.

Remarkably, neither the courts nor the attorneys in these cases seemed to be aware of the comparable body of law

regarding allowance of interest in cases extended by appeals. Neither plaintiff contended that the final district court judgment should have borne interest from the date of the verdict. Judge Mikva's well-reasoned dissent in *Hooks* tried to frame the dispositive issue as unrelated to Rule 54(b), but the dissent was unable to put the issue in a proper framework.[32]

Procedural rules applicable in district courts refer to judgments for many purposes. It is a mistake to consider any rule independent of its manifest purpose. The time for filing post-verdict motions is very short; the date that opens the period is fixed by a clerk-entered judgment under FED. R. CIV. P. 58, 59(b); *cf.* FED. R. CIV. P. 50(b). Ripening of the right of a party to take an appeal and setting a baseline for measuring the timeliness of a notice of appeal are functions of an entry of a judgment. FED. R. CIV. P. 73, 54(b). Execution of judgment becomes timely 10 days after its entry unless the court allows otherwise.

The question of the period of judgment interest to be allowed when extended proceedings occur in district courts is unlikely to be answered adequately by reference to docket entries. The remedial issue is separate from other aspects of district court procedure. Interest on a judgment is a corollary remedy incident to the final judgment. In many cases, clerk-entered judgments under Rule 58 will be a point to begin accrual of judgment interest, but an important and substantive

32. In *Ohio-Sealy,* the Seventh Circuit entertained a defense argument based upon Rule 54(b). The Court of Appeals found that this rule was not called into play in the case before it, thus distinguishing cases relied upon by defendant, rather than rejecting the argument as unsound in its premise. The Court of Appeals added, however, that "...it would make no sense to adopt the rule that interest to which [plaintiff] is entitled by law on its judgment properly entered under Rule 58 had to be forfeited if [plaintiff] desired to press its request for equitable relief." 585 F.2d at 846. The "sense" to which the Court of Appeals referred is an appropriate measure of the interest recovery, which is not necessarily determinable by the nature of the docket entries in a case. In *Ohio-Sealy,* a ministerial act under Rule 58 happened to fix the time when judgment interest should begin to accrue. The same result should be reached whether or not the court clerk carried out this duty on time.

remedial question should not be conditioned upon the ministerial act of a court clerk.

The same restitutionary purposes apply whether litigation is extended by trial court proceedings or by appellate review. The period of interest on a judgment should be related to the time when the amount of plaintiff's recovery on the underlying merits-claim became settled.

(3) Disallowance of Interest on Judgments in Extended Cases

Appellate Rule 37's provision on courts of appeals' decisions other than affirmances does not require allowance of judgment interest to relate back. The Rule requires that a court of appeals issue an explicit instruction with respect to interest for the period of the appeal. Neither the Rule nor the Advisory Committee's Notes make clear what circumstances would warrant a decision to disallow interest for the time before the court of appeals' judgment. One possibility, of course, is that the court of appeals may have factored into its calculation of the amount of a money judgment the time value of money for the full time before the appellate court's decision. If the court of appeals has not calculated the amount of the judgment, but remands for the lower court to do so, the nature of the remand may require that the distinct court make a calculation that factors in the time value of money up to the new determination of the principal sum of the money judgment.[33]

In a few cases, courts have denied judgment interest for some part of the period of extended litigation on the ground that interest should not begin to accrue until the amount of the principal obligation had been liquidated.[34] When the amount of

33. The court of appeals' judgment may be the first decision in the history of a case that establishes defendant's liability on the merits. Absent a prior verdict or trial court finding of either liability or the amount of recovery, the period of interest on the judgment would begin at the time of the court of appeals' judgment.

34. *See* Harris v. Chicago Great Western Ry. Co., 197 F.2d 829 (7th Cir. 1952); United States v. Hougham, 301 F.2d 133 (9th Cir. 1962); *cf.* Merchants Matrix Cut Syndicate, Inc. v. United States, 284 F.2d 456 (7th Cir. 1960). *See also* Hysell v. Iowa Public Service Co., 559 F.2d 468 (8th Cir. 1977). In *Hysell,*

recovery on a merits-claim is in controversy, the amount may be ultimately fixed long after merits-claim liability has been established. Most of the cases in this category, as discussed earlier, give no weight to the notion that interest cannot accrue on an uncertain amount. This view has been associated in the past with awards of pre-judgment interest, but modern law regarding pre-judgment interest rejects this view.[35] Underlying the doctrine about uncertainty of amount was concern for a defendant's inability to stop accrual of interest by payment. Rule 67 of the Federal Rules of Civil Procedure allows a defendant, before or after trial, to deposit money in court and thereby control its interest liability for whatever amount defendant elects to deposit.[36] *Cf.* FED. R. CIV. P. 68. Whatever force exists in disallowing pre-judgment interest when neither defendant's liability nor the amount of recovery has been judicially established in any prior proceeding, the reasoning is inappropriate in any case involving interest on a judgment where a defendant's liability has been established conclusively and the only controverted issue is the amount of recovery.

The Fifth Circuit recently held that the discretion granted by Appellate Rule 37 and the leeway of "equitable construction" of §1961 permitted the court to disallow interest for the period of extended litigation even though the Court of Appeals had previously held that the District Court's judgment n.o.v. for defendant had been erroneous. The Court of Appeals explained its decision on the ground that plaintiff's victory on the merits-claim had not been "clear cut." The merit-claim was a private

NOTES *(Continued)*

a bench trial in a personal injury case concluded with a judgment for plaintiffs. The Court of Appeals reversed for lack of sufficient findings under Fed. R. Civ. P. 52(a). On remand, the District Court made specific findings of fact and awarded the same amounts to plaintiffs. The Court of Appeals, affirming, held that interest on the judgment did not begin until the second trial court judgment. The Court of Appeals relied solely on its own earlier decision denying relief for lack of an Appellate Rule 37 mandate and lack of a timely request to recall the mandate. Riha v. International Telephone & Telegraph Corp., 533 F.2d 1053 (8th Cir. 1976).

35. *See* note 3 *supra.*

36. *See* Perkins v. Standard Oil Co., 487 F.2d 672, 675 (9th Cir. 1973).

antitrust suit based upon a conspiracy between government officials and cable television companies to allocate territories within the City of Houston. The Court of Appeals had upheld plaintiff's right to recover against one of the private companies involved. In denying judgment interest, the court appears to have been influenced by the view that antitrust regulation will not be, in the end, a tool for regulating state or city governments. A concurring judge, Judge Patrick Higginbotham, wrote: "In my view, this defendant was defeated on the merits because it passed through a time window of changing law rather than because it engaged in conduct that was malevolent by antitrust standards." *Affiliated Capital Corp. v. City of Houston,* 793 F.2d 706, 712, 713 (5th Cir. 1986).

The Fifth Circuit's decision in *Affiliated Capital* may be explicable on the narrow ground that plaintiff's victory on the merits-claim rested upon a substantive legal standard of doubtful validity in light of changing law. Whether the Court of Appeals will allow or require case-by-case consideration of the "equities" in other circumstances seems doubtful. Hard cases do sometimes make bad law. In reaching for a rationale to disallow judgment interest in this particular case, the Court of Appeals may have overstated the criteria to be followed in more typical cases. Allowance of interest on judgments ought to be determined by principled and predictable criteria. The language of *Affiliated Capital* does not meet this standard.

A 1983 district court decision disallowed interest on a judgment for the period between a verdict for plaintiff and final judgment in the district court. Judge Leval found that the substantial interval of time between verdict and judgment was attributable to three separate instances of misconduct by plaintiff's counsel. *Red Star Towing & Transporation Co. v. The Cargo Ship "Ming Giant",* 563 F. Supp. 224 (S.D.N.Y. 1983).

(4) Conclusion

Overall, federal courts have provided consistent and sound answers to the first two questions posed at the outset of this part of the paper. When extended litigation occurs, determinations regarding interest on judgments are a function of the ultimate

judgments that bring to a close the controversy on the underlying merits-claims. When those ultimate judgments are entered, courts look back through the time that has elapsed and allow interest on the judgments to begin to accrue when the amounts of recovery on the merits-claims are no longer subject to adjustment to take account of the time value of money. Allowance of interest on a judgment begins with the earlier of the date substantially establishing defendant's liability or the date settling the amount of recovery. These decisions of the courts are a reasonable interpretation of the governing statute, §1961, and the ancillary rule, Appellate Rule 37. The result goes far toward serving the restitutionary goal of treating parties to extended litigation neutrally, so that neither benefits nor suffers substantially from the passage of time needed to conclude litigation.

We turn now to the third question: what rate of interest applies in extended litigation with regard to judgment interest?

B. Rate of Interest Applicable in Calculation of Interest on Judgments

When a controlling judgment has established that a plaintiff is entitled to a money judgment and has determined that interest is to be allowed on the judgment, the "principal" of the classic interest calculation formula is fixed. The "time" element is resolved by the issues discussed in Part III A. With a known "principal" and the period of "time" established, the remaining factor is the "rate of interest." Multiplying the amount of the "principal" by the "rate of interest" for the determined "time" produces the amount of interest.

For calculations of interest on judgments in federal courts, the rate of interest is set by statute.[37] The purpose of this part of the paper is to examine the relevant statutory provisions and

37. Courts sometimes use the statutory rate for interest on judgments as a guide to the choice of a proper rate of pre-judgment interest. *See, e.g.*, United States v. Dollar Rent A Car Systems, Inc., 712 F.2d 938, 940 n.5 (4th Cir. 1983).

their implementation in cases allowing interest on judgments, particularly in protracted litigation.

(1) The Statutory Interest Rate

Section 1961(a) provides that interest shall be calculated:

> at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of judgment.

Section 1961(b) adds:

> Interest shall be computed daily to the date of payment . . . and shall be compounded annually.

The Treasury bill transactions to which the statutory rate of interest is indexed are well-known, regular transactions in the marketplace. The Treasury has borrowed money through this device regularly for many years. Records of the results of the auctions are readily accessible.[38] A chart tracing the average rates of interest over the past decade appears in Part I of this paper (p. 6 *supra*).

The statutory scheme in §1961 contemplates that, for any given judgment, only one reference will be made to the Treasury bill marketplace. The statute plainly rejects the possibility of a judgment being subject to a floating interest rate. Floating rates are commonly found in private credit transactions. Rates of interest in such transactions move up or down or remain constant in response to rate changes in the marketplace. For interest on a judgment, however, the rate observed in the market at a statutorily designated moment applies to that judgment as a fixed rate of interest for the entire period of interest accrual. A "snapshot" rather than a motion picture is taken. Section 1961 specifies that the point of time for reference

38. The statute requires the Director of the Administrative Office of the United States Courts to distribute notices of the rate and any changes in it. Notices from the Administrative Office serve the convenience of the courts, but the data are available, if necessary, from other sources.

to the Treasury bill market is "the last auction . . . immediately prior to the date of judgment."

In an ordinary case, the legislative choice refers to the Treasury bill rate settled just before the period of judgment interest begins to run. Where a district court's judgment follows promptly after the fact-finding determination and no appeal is taken, the whole period of interest on the judgment comes after entry of the controlling judgment.

If the period of interest on a judgment runs beyond one year, §1961 provides for compound interest to be calculated. The amount of accrued and unpaid interest at the end of the first year is added to the amount of the unpaid principal and, for the second year or any part thereof, interest accrues at the rate originally fixed for the judgment but on the total of unpaid interest and principal. Should the judgment remain unpaid at the end of another year, the same process of recomputing the amount of principal would be followed again.

(2) The Rate Of Interest Applicable In Extended Litigation

For reasons explored in Part IIIA, extended litigation differs from the simple model of litigation. In many cases, the period of interest on a judgment begins to run before the date of the controlling judgment. When interest on a judgment begins to accrue before the entry of the ultimate controlling judgment, proper application of §1961 must be determined. The legislative choices of applying a single rate of interest to the entire period of judgment interest, of setting the rate as of the beginning of the interest period, and of taking a "snapshot" of Treasury bill market rates immediately before the interest period can be adapted easily to cases of extended litigation. In such a case, after the period of interest accrual has been defined, the parties can make the requisite "snapshot" observation of the Treasury bill market place and apply the observed rate to the amount of the principal for that period. The process of implementation requires no intervention by courts. Section 1961 would thereby be applied consistently in simple cases and cases of extended litigation.

An example demonstrates the point. Assume that: (1) A jury verdict for plaintiff in the amount of $100,000 was returned May 1, 1985. (2) A timely motion for judgment n.o.v. was filed by defendant and granted by the trial court on November 1, 1985. (3) On September 1, 1986, the court of appeals reversed the judgment below, directed entry of judgment on the basis of the jury verdict of May 1, 1985, and provided by its mandate for interest from that date. In this situation, the controlling judgment is that of the court of appeals. The erroneous judgment below was entered months after the jury verdict. The date when judgment on the verdict in favor of plaintiff should have been entered was the date of the verdict. A clerk-entered judgment pursuant to Fed. R. Civ. P. 58 may or may not have been entered on that date. To carry out the manifest intent of §1961(a), the proper rate of interest in this case would be ascertained by reference to the last Treasury bill auction before May 1, 1985. That rate should apply, with annual compounding, until the judgment has been satisfied.

The need to be concerned about determining the correct time for the "snapshot" of a market rate of interest is largely a result of the statutory scheme adopted in 1982. The referenced source of interest rates is a dynamic market that changes month by month. It matters, and depending on the volatility of the market, it may matter a lot that the proper point of time is used. Before the 1982 amendment of §1961, the statute incorporated by reference a source of interest rates that was highly stable. The federal statute referred to judgment interest rates of the states in which the federal courts sat.[39] The underlying rates were embedded in state statutory laws that, until recently, changed very infrequently. In application of the pre-1982 version of §1961, even in extended litigation, an issue was unlikely to arise concerning the correct date to look at state law. The statutory scheme was, for this function, not time-sensitive. Section 1961, in its current form, is quite time-sensitive.

Case law under the superseded form of §1961 was unlikely to contain precedents dealing with the proper time to refer to

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39. *See* note 9 *supra.*

interest rates set by state law. However, one significant decision did come down under that version of §1961. In the years before 1982, some state legislatures acted to amend their statutory rates to reflect better the actual time value of money. Oregon was one such state. As a result, in a case of extended litigation in federal court, it became necessary to decide the time for the "snapshot." The case was the Ninth Circuit decision holding that the period of interest on a judgment began as of the date of the verdict where the District Court had erred in granting judgment n.o.v. for defendant.[40] The Court of Appeals for the Ninth Circuit held that the proper time to look to state law was the time when judgment interest began to accrue rather than the later time when the controlling appellate judgment reversed the erroneous trial court judgment. *Turner v. Japan Lines, Ltd.* 702 F.2d 752 (9th Cir. 1983).[41]

The *Turner* rationale is fully applicable to §1961 as amended in 1982. Congress made no change in the language defining the moment of the proper "spanshot." Only the place at which to point the camera was revised. On the time to refer to the Treasury bill market under present law, therefore, *Turner* is on point. More decisions on the issue can be expected in the future because of the heightened time-sensitivity of §1961 in its current form. *Turner* is a sound construction of the law in the context of extended litigation. It should be followed.

(3) Transition Questions Presented When §1961 Was Amended

After Congress amended §1961 in 1982, ongoing cases in the federal courts eventually came to, or will come to conclusion, many with plaintiffs prevailing in actions for money judgments. In cases of an extended nature already concluded, interest on the judgments has been allowed for periods of time

40. This case was discussed at length in Part IIIA, at pp. 16-17 *supra.*

41. The *Turner* court considered the possibility of stepping up the rate of interest as of the date of change in state laws. Following what the court understood to be the state law on changing interest rates during the life of a judgment, the court declined to make this adjustment. *See* Annot., 41 A.L.R. 4th 694 (1985).

that extended back before the effective date of the amendment. The question inevitably arose whether and how the amended version of §1961 applied in extended litigation that reached ultimate conclusion on the merits-claims after October 1, 1982. That was the effective date of the Federal Courts Improvement Act of 1982, one section of which contained the amendment of §1961.[42]

(a) When §1961 as Amended Governs

Courts that have faced the contention that §1961 as amended governed allowance of interest on judgments in cases ongoing as of October 1, 1982, have concluded that the pivot point was *a* judgment date. Two possible judgment dates were considered in typical extended litigation cases. One was the ultimate and controlling judgment, typically a court of appeals judgment, that brought to a close controversy over issues related to the merits-claims. Alternatively, courts focused on the penultimate judgment, typically the trial court judgment that, whether affirmed or reversed, moved the merits-claim litigation toward its eventual conclusion. Most courts resolved the question by choosing the second alternative.

Arguments could be advanced for either choice. Section 1961(a), on its face, speaks of allowance of interest "on any money judgment in a civil case recovered in a district court." Even though controlling judgments are frequently decisions of appellate courts, those decisions are eventually made effective by mandates to district courts. For purposes of dating the

42. Description of October 1, 1982 as the effective date of the amendment of §1961 may be questionable. The amendment was a small appendage to the Federal Courts Improvement Act of 1982, which, principally, created a new federal appellate court, the Court of Appeals for the Federal Circuit, and modified the legislative charter of the Court of Claims. Pub.L. No. 97-164, Title I, 96 Stat. 55 (1982). It was, of course, imperative to have a specific date on which the new appellate court and the modified Court of Claims began to function. The effective date provision, Title IV, §402, would be most meaningful for that purpose.

effectiveness of statutory change, one could look to the kind of judgment mentioned in the statute.[43]

On the other hand, the amendment of §1961 had a remedial purpose of considerable importance.[44] Legislative procedures are slow to come to fruition. Impetus for reform of §1961 began long before 1982.[45] The consummated reform would be imple-

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43. For this purpose, the district court judgments entered after the courts of appeals mandates might have been more appropriate to consider than the district court judgments entered before appeal.

44. The Senate Report accompanying the bill that became the Federal Courts Improvement Act of 1982 gave this explanation of the purpose of the amendment of §1961:

> Section 302. Under current law, the interest rate granted on judgments during appeal is based on varying State laws and frequently falls below the contemporary cost of money. As a consequence, a losing defendant may have an economic incentive to appeal a judgment solely in order to retain his money and accumulate interest on it at the commercial rate during the pendency of the appeal.
>
> Section 302 amends 28 U.S.C. 1961 by setting a realistic and nationally [*sic*] rate of interest on judgments in the Federal courts. The provision would tie the post-judgment interest rate to the rate used by the Internal Revenue Service for delinquent taxes under 26 U.S.C. 6621. That rate is a composite of prime rates from throughout the country that is reviewed and revised periodically. Furthermore, by consolidating all the provisions for interest on judgments of Title 28 into this section, this rate becomes uniformly applicable to all litigation in the Federal courts.

S. Rep. No. 97-275, 97th Cong., 1st Sess. 30 (1981); *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 40. The bill was amended on the floor of Congress to substitute Treasury bill rates of interest for the composite of prime rates in the bill as reported. *See* 127 CONG. REC. 14,683, 14,699, 14,701 (1981).

45. President Carter formally proposed that §1961 be amended on February 27, 1979. In a Message to Congress, he offered a number of new measures to solve problems relating to administration of the federal courts. With respect to interest on judgments, he declared:

> Sometimes years pass between the time of an injury and the granting of a judgment. More years may pass while that judgment is appealed. Current federal law is ambiguous about whether and under what circumstances interest may be paid for the period prior to judgment, and permits unrealistically low as well as conflicting rates of interest while the decision is under appeal. Yet such interest may be essential in order to truly compensate the plaintiff or to avoid the unjust enrichment of the defendant . . . If a judgment on appeal is entered at a rate well below the prime interest rate, the losing party may well profit from the appeal.

H.R. Doc. No. 96-59, 96th Cong., 1st Sess. 4 (1979). More than three years passed before President Carter's initiative was enacted into law. The delay was associated with controversy over other aspects of the legislation that became the Federal Courts Improvement Act of 1982.

mented most quickly if the new act were held to govern when the ultimate controlling judgments came down after its effective date.

Ultimate resolution of all issues on the underlying merits-claims does not assure prompt payments by defendants. Considerable time may elapse before any money judgment is satisfied. In 1983, the United States recovered a money judgment to renew a 1969 judgment. Renewal was necessary in order to levy on defendant's property, since the judgment lien on the prior judgment, though not the monetary obligation of the judgment, had expired. The Court of Appeals for the Second Circuit upheld the new judgment and directed that it bear interest under the current version of §1961. *United States v. Hannon,* 728 F.2d 142 (2d Cir. 1984).[46]

For any period of time, long or short, after an ultimate judgment entered after October 1, 1982, the rate of interest should be that fixed under the 1982 version of §1961. Given that current law applies with respect to judgment interest from the date of a current judgment to the future date of payment, the same rate should apply to the entire period of interest on the judgment. The statutory scheme of §1961 clearly contemplates one rate of interest for the whole period of judgment interest. It follows that the rate on judgments in extended litigation that concludes after 1982 should be established under §1961 as amended.

Precedent for choice of the ultimate controlling judgments as the pivotal time for applying §1961 as amended in ongoing

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46. *Hannon* involved considerable unpaid interest that had accrued on the 1969 judgment. For purposes of the 1983 judgment, this unpaid post-judgment interest became pre-judgment interest. The Court of Appeals left open for the lower court whether, in calculating the pre-judgment interest, effect should be given to the amendment of §1961 in 1982. 728 F.2d at 145-146 n.7.

cases is found in the implementation of analogous provisions in the Federal Rules of Civil Procedure, promulgated in 1938.

Rule 54 significantly altered the law then extant regarding taxation of costs. The Rules became effective on September 1, 1938. Two weeks later, the Court of Appeals for the Ninth Circuit issued a controlling judgment reversing a lower court decision for plaintiff in an income tax controversy. *Welch v. Solomon,* 99 F.2d 41 (9th Cir. 1938). On remand, costs were taxed pursuant to Rule 54(d), which the lower court held was the current and, therefore, the governing law. *Solomon v. Welch,* 28 F. Supp. 823 (S.D. Cal. 1939).

In a case pending on appeal in the Eighth Circuit at the time of the effective date of the amendment to §1961, the lower court had awarded plaintiffs attorneys' fees and costs but had denied interest on the award. The Court of Appeals held that interest should have been granted on the award and directed that interest be computed at the rate of amended §1961 for the full period of interest. The controlling judgment regarding interest was that of the Court of Appeals. The law in effect when that judgment was entered was the amended version of §1961. The Court of Appeals said: "It is the law now, and should be used by the District Court." *R. W. T. v. Dalton,* 712 F.2d 1225, 1235 (8th Cir.), *cert. denied,* 464 U.S. 1009 (1983).[47]

After the amendment of §1961, most Courts of Appeals chose the date of the penultimate district court judgments as the pivotal date. These courts held that the law that governed interest on judgments was the law in effect at the time of the lower courts' judgments. The doubtful quality of the advocacy in these cases and the absence of overt consideration by the courts of the alternative theory, that the pivotal judgment was the ultimate judgment, make it questionable whether the decisions are properly characterized as holdings. Many of the cases were

47. *See also* Bradley v. School Board, 416 U.S. 696, 94 S. Ct. 2006, 40 L. Ed.2d 476 (1974) (application of Attorney's Fees Awards Act of 1976 to case pending on appeal when the Act took effect).

complicated by failure of plaintiffs to bring the 1982 amendment to the attention of the courts in timely fashion.[48]

Most of these Court of Appeals' decisions were affirmances or substantial affirmances of the judgments of the courts below. In that circumstance, it is less clear that the court of appeals' action was the controlling judgment than in cases where the appellate court has reversed or modified a judgment of the court below.

Illustrative of courts that chose the penultimate judgment as the pivotal date is a Second Circuit decision in a private antitrust case. The case was on appeal when §1961 was amended. The appeal concluded with the Court of Appeals affirming judgment for the plaintiff. After denial of certiorari by the Supreme Court and remand to the trial court, plaintiff for the first time sought to have the rate of interest of amended §1961 applied. As the briefs make clear, counsel assumed that the date of the District Court judgment controlled, but agrued for retrospective application of the amendment. The District Court denied the request and the Court of Appeals affirmed. *Litton Systems, Inc. v. American Telephone & Telegraph Co.,* 746 F.2d 168 (2d Cir. 1984). Both courts applied the rate of interest on judgments in effect when the trial court had entered its final judgment for plaintiff before October 1, 1982.

In two Fifth Circuit cases, trial court judgments for plaintiffs entered before §1961 was amended were substantially affirmed after the amendment. Further trial court proceedings were necessary in both cases. In the first case, this led to modification of the percentages of negligence in a comparative

48. In some instances, counsel first raised the point after the principal amount of the judgment and interest on the judgment had been paid. United States ex rel. Billows Electric Supply Co. v. E.J.T. Construction Co., 557 F. Supp. 514 (E.D. Pa. 1983), *aff'd,* 729 F.2d 1450 (3d Cir. 1984); *and see* International Telemeter Corp. v. Hamlin International Corp., 754 F.2d 1492 (9th Cir. 1985). In other cases, counsel never relied on the amendment to §1961; the courts *sua sponte* took note of the amendment and found it inapplicable. Peterson v. Crown Financial Corp., 553 F. Supp. 114, 116-117 n.4 (E.D. Pa. 1982); United States v. Dollar Rent A Car Systems, Inc., 712 F.2d 938, 940 n.5 (4th Cir. 1983).

negligence allocation. In the second, the further consideration did not result in any change of the amount of the judgment. In both cases the rate of interest under the old version of §1961 was held to apply, but only for the time that elapsed during the appeals of the original judgments. The opinions indicated that the §1961 amendment would apply thereafter. *Brooks v. United States,* 757 F.2d 734 (5th Cir. 1985); *Reaves v. Ole Man River Towing, Inc.,* 761 F.2d 1111 (5th Cir. 1985).

Without explanation and by a *per curiam* opinion, the Court of Appeals for the Seventh Circuit held that the law in effect at the time of a lower court's erroneous judgment applied to determine the rate of interest recoverable by plaintiffs. The Court of Appeals had issued the controlling judgment, directing that the District Court enter judgment for plaintiffs on an arbitration award which the lower court had refused to confirm. Although the Court of Appeals' judgment was made in 1984, that court declared that the date of the lower court's judgment governed. *Merit Insurance Co. v. Leatherby Insurance Co.,* 728 F.2d 943 (7th Cir. 1984).

In a Third Circuit case, the 1982 amendment took effect after the Court of Appeals had reversed a trial court judgment and remanded for further proceedings. The timing differed from the prior cases in which the appellate courts' decisions were rendered after October 1, 1982. The District Court concluded those further proceedings after the amendment was in effect. Because of the extended litigation, plaintiff was held entitled to interest on the judgment beginning in July 1979, the date of the District Court's prior erroneous judgment. Plaintiff did not contend that the interest should be calculated under §1961 as amended.[49] The District Court, *sua sponte,* noted the new law but stated that the law in effect at the time of the 1979 judgment governed. *Peterson v. Crown Financial Corp.,* 553 F. Supp. 114, 116-117 n.4 (E.D. Pa. 1982).[50]

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49. Plaintiffs sole strategy was to seek to have the period of pre-judgment interest brought forward to the current proceeding.

50. In another district court proceeding in the Third Circuit, a petition for certiorari from a Court of Appeals' decision in May 1982 was denied by the Supreme Court in October 1982, a few days after the amendment to §1961 took effect. No further proceedings were required in the District Court. After defendant had paid the judgment and interest on the judgment, plaintiff sought additional interest under §1961 as amended. Plaintiff contended that the date of the Supreme Court's denial of certiorari was sufficient to bring the judgment under the new version §1961 for purposes of the rate of interest. The District Court denied the request for additional interest. United States ex rel. Billows Electric Supply Co. v. E. J. T. Construction Co., 557 F. Supp. 514 (E.D. Pa. 1983), *aff'd,* 729 F.2d 1450 (3d Cir. 1984)

None of the courts basing their choice of law on earlier district court judgments addressed the pernicious consequence of failure to give prompt effect to §1961 as amended. The rates of interest on judgments applicable under the pre-1982 version of the §1961 could be and often were very low relative to rates of interest prevailing in the market place. Section 1961 was amended to correct a mischief which, among other things, induced defendants to try to prolong litigation. Panels of the Second Circuit had angrily declared in several appeals that defendants' sole reasons for appeal were to obtain the benefit of the difference between time value of money in the market place and the rate of interest on judgments. *Bankers Trust Co. v. Publicker Industries, Inc.,* 641 F.2d 1361, 1367 (2d Cir. 1981); *Brady v. Chemical Construction Corp.,* 740 F.2d 195, 202 (2d Cir. 1984). The *Litton—Merit Insurance Co.* position diluted the effectiveness of the legislature's response to a manifest problem.[51] The Fifth Circuit, by limiting the time to which the old interest rate would apply, alleviated to some extent the harm to the parties and to the judicial system.

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51. Remarkably, the Second Circuit in *Litton* cited *Brady,* without noting this aspect of the decision. 746 F.2d at 176. The failure of the Second Circuit panel in *Litton* to take account of the deleterious effect of delayed implementation of an important reform may be explained by the fact that, at the time of its decision, the defendant had already paid the judgment. *See* 746 F.2d at 170 n.3. However, the *Merit* Insurance Co. litigation continued. For a vehement opinion dismissing a later appeal by defendant, *see* Merit Insurance Co. v. Leatherby Insurance Co., 737 F.2d 580 (7th Cir.), *cert. denied,* _____ U.S. _____, 105 S. Ct. 297 (1984). *And see* Note, *The Post-Judgment Interest Rate in Pennsylvania: Ignoring Reality Too Long,* 23 DUQUESNE L. REV. 1083 (1984).

(b) Effect of 1982 Amendment on Judgments Governed Initially by the Prior Version of §1961

When §1961 was amended, effective October 1, 1982, many judgments entered before that date were still unsatisfied. Some were unsatisfied because the judgments had been stayed pending the conclusion of ongoing litigation. As noted in the previous section, a number of courts, after the litigation had run its course, held that the pre-1982 version of §1961 applied to fix the rate of interest on the judgments. Several courts, having concluded that the prior version of §1961 governed the judgments as entered, held that the rate of interest would step up, as of October 1, 1982, to a rate ascertained by application of §1961 as amended.

The Court of Appeals for the Second Circuit suggested this should occur, but left the matter open for the District Court to decide. *United States v. Hannon*, 728 F.2d 142, 145-146 n.7 (2d Cir. 1984) (1969 judgment). In a later case, however, the Court of Appeals held that the amendment of §1961 could not sensibly be construed to increase rates on pending judgments as of its effective date because the amendment was a change in the method of ascertaining the rate, not a change in rate, and because a change in the interest rate midway in the period of accrual of interest was inconsistent with the statutory provision that tied the applicable rate of interest to the date of judgment. *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 746 F.2d 168 (2d Cir. 1984).

The Court of Appeals for the Ninth Circuit disagreed and ordered that the interest rate on a judgment, pending when §1961 was amended, be shifted to the rate determined by the amended provision. The case was an extended private antitrust action in which plaintiff finally prevailed in 1984. Because of the delay caused by the case having been tried to a jury twice and appealed several times, the court determined that interest on the judgment would begin in 1976, the date of the first verdict. From that date to October 1, 1982, the judgment bore interest under the old version of §1961, which borrowed the rate

applicable under state law. On the effective date of the amendment, the rate of interest was fixed pursuant to the formula in §1961 as amended. *Handgards, Inc. v. Ethicon, Inc.*, 552 F. Supp. 820 (N.D. Cal. 1982), *aff'd*, 743 F.2d 1282 (9th Cir. 1984).[52]

As previously noted, the Court of Appeals for the Fifth Circuit, while not using October 1, 1982, as the pivot, held in two cases that the new version of §1961 would apply to unsatisfied judgments at some point thereafter. That court allowed the pre-1982 version to apply for the full time of one stage of extended litigation that straddled October 1, 1982. *Brooks v. United States*, 757 F.2d 734 (5th Cir. 1985); *Reaves v. Ole Man River Towing, Inc.*, 761 F.2d 1111 (5th Cir. 1985).

A number of other courts rendered decisions in which a change from the old version of §1961 to the new could have been considered, but the opinions give no indication that either the parties or the court thought of the possibility. *See, e.g., United States v. Dollar Rent A Car Systems, Inc.*, 712 F.2d 938 (4th Cir. 1983); *Merit Insurance Co. v. Leatherby Insurance Co.*, 728 F.2d 943 (7th Cir. 1984); *Peterson v. Crown Financial Corp.*, 553 F. Supp. 114 (E.D. Pa. 1982); *see also United States ex rel. Billows Electric Supply Co. v. E.J.T. Construction Co.*, 557 F. Supp. 514 (E.D. Pa. 1983), *aff'd*, 729 F.2d 1450 (3d Cir. 1984).

Handgards demonstrated the feasibility of adapting an open judgment to a new rate of interest. *Litton's* doubts, whatever they may have been, were soluble. Adaptation is not only feasible, but affirmatively desirable to bring into force as promptly as possible the reform of the law embodied in the new legislation. Sub-market rates of interest distort the dynamics of litigation and deprive the courts of the power to grant an effective restitution remedy that transfers benefits obtained by defendants to compensate plaintiffs for losses suffered. Section 1961, as amended in 1982, adopts a conservative, standard

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52. In addition to shifting the rate of interest as of the effective date of the amendment to §1961, the courts in *Handgards* utilized different sums as the principal in the two periods of interest calculation. For discussion of the questionable use of two principal amounts, *see* text at p. 23 *supra*.

measure of the benefits/losses that consciously understates the time value of money in credit transactions involving ordinary business entities. Prompt implementation of the reformed measure of the remedy is sound judicial policy.

CONCLUSION

Federal law on judgment interest has emerged as a major issue of remedies. During the past fifteen years, Congress and the courts have acted to define the remedy of interest on money judgments to meet the circumstance of a sharp rise in the time value of money. The governing statute and court rule continue the historic principle that the remedy of judgment interest serves the elementary goal of restitution: neither party should obtain a benefit or suffer a loss because of the extended time necessarily required for litigation to run its course. The extraordinarily high level of the time value of money in recent years has led the parties and the courts to examine with greater care the dimensions of the remedy of judgment interest, a question treated more or less perfunctorily in the past. The concern has been greatest in litigation extended in time.

In cases where extensive time has elapsed in resolution of the merits-claims being litigated, the corollary remedy of judgment interest has been articulated with the timing of decisions regarding those underlying claims. When the amount of recovery on an underlying claim is no longer subject to adjustment for the time value of money, the period for judgment interest begins. In extended litigation, this often requires that judgment interest accrue during post-verdict or post-finding proceedings and during periods of appellate review.

The rate of interest on judgments, historically fixed by law at a rate above prevailing marketplace rates by use of "legal interest" or the equivalent, now tracks marketplace rates through monthly auctions of Treasury bills.

Interest on judgments has moved into the forefront of remedial law. The elements of a federal law responsive to the new economic climate are already in place. A coherent, principled and sound analysis of the remedy is now clearly evident in the analyses of the courts.

APPENDIX

**ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C., 20544**

WILLIAM E. FOLEY
DIRECTOR

CARL H. IMLAY
GENERAL COUNSEL

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

June 22, 1982

MEMORANDUM TO ALL: United States Judges
United States Magistrates
Circuit Executives
Clerks of Court
District Circuit Executives

SUBJECT: Post-Judgment Interest

Pursuant to the provisions of §302 of the Federal Courts Improvement Act of 1982, P.L. 97-164, signed April 2, 1982, and effective October 1, 1982, post-judgment interest on most civil money judgments will be computed at a new, and varying rate.

Present law, 28 U.S.C. §1961, ties interest rates on money judgments in the district courts (except tax cases) to the rates allowable under state law. Section 2411 provides that in United States cases, except tax cases, the rate is 4%. Tax cases carry a rate of interest set yearly by the Secretary of Treasury—currently 20%.

The purpose of the amendments is to set a realistic national rate, which will adapt to market conditions, thereby eliminating a major incentive for the filing of otherwise inappropriate appeals. The Judicial Conference has supported such a change for a number of years.

Initially, language in the various bills would have adopted for all cases the rate set for tax cases under 26 U.S.C. §6621. This rate is currently 20% due to very high interest rates in 1981 and will not be readjusted until February 1983. The Office of Management and Budget pointed out the high costs to the United States that this rate would cause, and noted that it does not change sufficiently often to reflect market conditions.

As a result, on December 8, 1981, Senator Grassley offered as an amendment on the Senate floor, the basic substance of the new provisions. Later refinements in language were made. For convenience, the full text of the amended sections, as they will read, is set out as an addendum.

The provisions of new section 1961 will apply in the district courts, to United States cases as well as private actions, but will not be applicable in the bankruptcy courts. This section will govern also the rate of interest on judgments of the Court of Appeals for the Federal Circuit. This provision is somewhat unusual for a Circuit Court, but is necessary since it will hear cases arising form the Court of International Trade, the Claims Court, a number of quasi-judicial boards and various executive agencies. Separate provisions are also made for United States Claims Court judgments.

The first questions to arise are, of course, the practical ones of what is the rate, how is it ascertained, when is it set, when the information becomes available and the like. We shall try to answer all of these as well as the initial legal questions.

The Treasury Department holds an auction of 52-week Treasury Bills every four weeks; therefore the rate will change thirteen times a year. The dates are set in advance, so that we now understand that the auction results of the September 30, 1982 auction will be initially applicable on October 1, 1982, the effective date of section 302. This assumes that Congress raises the debt limit sufficiently that an auction can be held. The precise rate will be certified to the Director of the Administrative Office by the Treasury after each auction. We are already receiving the certifications, so even if that particular auction were not held we will have certification of the applicable rate.

The Treasury Department also issues a press release which is usually carried in the Wall Street Journal and in some other papers. This reported rate may be difficult to locate. The Treasury press release calls this the "Investment Rate (Equivalent Coupon-issue Yield)." The financial press may use either name or may not report it at all. This rate must not be confused

with the average "annual investment *yield*—which is an entirely different rate used for purposes of the All-Savers Certificates.

At the request of the Director of the Administrative Office, the Treasury Department's recorded message reporting results of the most recent auctions of the 13, 26, and 52-week Treasury bills has been augmented to include the information the courts will need. That recording is reached by calling (202) 287-4100, in the Bureau of the Public Debt. The recording carries the "Equivalent Coupon-issue Yield" as such.

Judges, and clerks of court will be advised by the Administrative Office of the officially certified rate.

Once the rate has been established for a particular judgment, that rate will not change, even though a subsequent auction is held before the money is paid into the court, or the judgment is otherwise satisfied.

Although the matter will not arise in a specific case until late October, we deem it important to answer now, before problems occur, the question of what interest rate will be applicable to a judgment entered on the same day as the auction.

As the Supreme Court most recently pointed out in the case of *Bread Political Action Committee, et al v. F.E.C. et al,* United States Supreme Court, 80-1481, decided March 8, 1982, citing its prior decisions, the analysis of an issue of statutory construction begins with the language of the statute itself. Certainly one must start with the plain and ordinary meaning of the words of the legislature, before looking further afield.

For our purposes here, the language of the statute contains sufficient specificity that we must conclude that the court looks first at the *date* of the judgment, not its hour of signing.Then, a simple check of the calendar will reveal the date of the *last* auction *before* that date. By referring to the date of the judgment, rather than simply to the judgment, which would have raised the question of computation of time, both for events such as auctions, and time periods within which actions are to be taken, the Congress has made it clear that one is to consider the judgment as in existence for this purpose, on all of the day on which it is rendered. The usual rules as to the "date of

judgment" are applicable here. (See Rule 85 and Rule 79, Federal Rules of Civil Procedure.)

I conclude that the plain language of the law requires that the interest rate on judgments entered on the same day as an auction of 52-week Treasury bills is the rate of the preceeding [*sic*] auction.

While in most cases the parties themselves will perform the calculations, questions will inevitably arise to be presented to the Clerk's Office. One question may well be what the statute means when it says that the interest is *computed* daily but *compounded* annually. Either one of the following two equations,—either of which give the same result, could be used. (Watch out for calculator discrepancies due to dropping of digits!)

$$1.\quad \frac{\text{Equivalent coupon-issue yield}}{365\text{ (days)}} \times \text{amount of judgment} \times \text{(number of days interest has run.)}$$

Example, given a rate of 14.26%:

$$\frac{.1426}{365} \times \$20{,}000.00 \times 12\text{ (days)} = \$96.13$$

$$2.\quad \frac{\text{Equivalent coupon-issue yield} \times \text{amount of judgment}}{365\text{ (days)}} \times \text{(number of days interest has run.)}$$

Example, given a rate of 14.26%:

$$\frac{.1426 \times \$20{,}000.00}{365} \times 12\text{ (days)} = \$96.13$$

If the interest is to be compounded, due to a delay in payment of one year or more, simply multiply the equivalent coupon-issue yield by the amount of the judgment, then add that interest amount to the amount of the original judgment. This gives you a new judgment amount to be inserted in the equation for the shorter time periods.

We will be most happy to answer any other questions this topic generates.

Sincerely,

/s/
Carl H. Imlay
General Counsel

**ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544**

WILLIAM E. FOLEY
DIRECTOR

CARL H. IMLAY
GENERAL COUNSEL

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

July 27, 1982

MEMORANDUM TO ALL: United States Judges
United States Magistrates
Circuit Executives
Clerks of Court
District Court Executives

SUBJECT: Post-Judgment Interest—
Our Memorandum of June 22, 1982

I. Effective Date

There have been several recent inquiries to this office as to the interest rate which should apply to judgments entered prior to October 1, 1982, the effective date of the Federal Courts Improvement Act of 1982 (section 302(a), amending 28 U.S.C. § 1961). It is our view that the new rate will apply only to judgments entered on or after that date. The rate attaches as of the date of judgment and does not change thereafter unless the judgment is vacated or otherwise set aside.

II. Correction to Prior Memorandum

We have been advised that many small hand-held calculators will drop any digits more than two places to the right of the decimal point—thus giving different answers to the two equations contained in our June 22nd memorandum. Because the daily interest rate computed under equation #1 will be a very small number, it may be easier to use equation #2 on any hand-size calculators. If you get different answers depending upon whether you use equation #1 or equation #2, the problem is in the calculator.

The difficulty of assuring accuracy in the calculation of interest is illustrated by errors on page 4 of our memorandum, in which the assumed interest rate in both equations was shown as 14.26 percent but should have read 14.62 percent. Please substitute the two attached pages for pages three and four of the June 22nd memorandum.

It seems advisable to emphasize again that in most cases the parties should be expected to perform the calculations of the applicable interest rate. This information is being provided so that judicial officers and employees can be responsive to questions on this issue.

Sincerely

/s/

CARL H. IMLAY
General Counsel

Enclosures

28 U.S.C. § 1961. Interest

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of title 28, United States Code, and section 1302 of the Act of July 27, 1956 (31 U.S.C. § 724a), and shall be compounded annually.

(c)(1) This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at a rate established under section 6621 of the Internal Revenue Code of 1954.

(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal circuit, at the rate provided in subsection (a) and as provided in subsection (b).

(3) Interest shall be allowed, computed, and paid on judgments of the United States Claims Court only as provided in paragraph (1) of this subsection or in any other provision of law.

(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.

* * *

28 U.S.C. § 2411. Interest

In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at an annual rate established under section 6621 of the Internal Revenue Code of 1954 upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor.

* * *

28 U.S.C. § 2516. Interest on claims and judgments

(a) Interest on a claim against the United States shall be allowed in a judgment of the United States Claims Court only

under a contract or Act of Congress expressly providing for payment thereof.

(b) Interest on judgments against the United States affirmed by the Supreme Court after review on petition of the United States shall be paid, from the date of the filing of the transcript of the judgment in the General Accounting Office to the date of the mandate of the affirmance, at a rate of interest equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. Such interest shall not be allowed for any period after the term of the Supreme Court at which the judgment was affirmed.

* * *

31 U.S.C. § 724a. Appropriations for payment of judgments and compromise settlements against United States

There are appropriated, out of any money in the Treasury not otherwise appropriated, and out of the postal revenues, respectively, such sums as may on and after July 27, 1956 be necessary for the payment, not otherwise provided for, as certified by the Comptroller General, of final judgments, awards, and compromise settlements (not in excess of $100,000, or its equivalent in foreign currencies at the time of payment, in any one case) which are payable in accordance with the terms of sections 2414, 2517, 2672, or 2677 of Title 28, together with such interest and costs as may be specified in such judgments or otherwise authorized by law: *Provided*, That, whenever a judgment of a district court is payable from this appropriation, interest shall be paid thereon only when such judgment becomes final after review on appeal or petition by the United States, and then only from the date of the filing of the transcript thereof in the General Accounting Office to the date of the mandate of affirmance (except that in cases reviewed by the Supreme Court interest shall not be allowed beyond the term of the Court at which the judgment was affirmed): *Provided further*, That whenever a judgment rendered by the Courts of

Appeals for the Federal Circuit or the United States Claims Court is payable from this appropriation, interest payable thereon in accordance with section 2516(b) of Title 28 shall be computed from the date of the filing of the transcript thereof in the General Accounting Office: *Provided further*, That any judgment or compromise settlement against the United States arising out of an express or implied contract entered into by the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration, shall be paid in accordance with this section and sections 2414, 2517, and 2518 of Title 28, and such instrumentality shall reimburse the United States for a judgment or compromise settlement paid by the United States. Notwithstanding the other provisions of this section, judgments against the United States arising out of activities of the United States Postal Service shall be paid by the Postal Service out of any funds available to it.

Judges and clerks of court will be advised by the Administrative Office of the officially certified rate.

Once the rate has been established for a particular judgment, that rate will not change even if a subsequent auction should be held before the money is paid into the court or the judgment otherwise satisfied.

Although the matter will not arise in a specific case until later October, we deem it important to anwer now, before problems occur, the question of what interest rate will be applicable to a judgment entered on the same day as the auction.

As the Supreme Court most recently pointed out in the case of *Bread Political Action Committee v. Federal Election Commission*, 455 U.S. ____, 102 S.Ct. 1235 (1982), citing its prior decisions, the analysis of an issue of statutory construction begins with the language of the statute itself. Certainly one must start with the plain ordinary meaning of the words of the legislature before looking farther afield.

The language of this statute contains sufficient specificity that we conclude the court should be guided first by the *date* of the judgment, disregarding its hour of signing. Then, a simple check of the calendar will reveal the date of the *last* auction

before that date. By referring to the date of the judgment (rather than simply to "the judgment," which would have raised the question of computation of time, both for events such as auctions, and time periods within which actions are to be taken) the Congress has established that the judgment is to be treated as in existence on the whole day upon which it was rendered. The usual rules as to the "date of judgment" are applicable here. (See Rule 58 and Rule 79, Federal Rules of Civil Procedure.)

I conclude that the plain language of the law requires that the interest rate on judgments entered on the same day as an auction of 52-week Treasury bills is the rate as of the preceding auction.

While in most cases the parties themselves will perform the calculations, questions will inevitably arise to be presented to the Clerk's Office. One question may well be what the statute means when it says that the interest is *computed* daily but *compounded* annually. Either one of the following two equations, both of which give the same result, may be used. (Watch out for calculator discrepancies due to dropping of digits.)

1. $\dfrac{\text{Equivalent coupon-issue yield}}{\text{365 (days)}} \times \text{(amt. of judgment)} \times \text{(no. of days interest has run.)}$

Example, given a rate of 14.62%:

$$\frac{.1462}{365} \times \$20{,}000.00 \times 12 \text{ (days)} = \$96.13$$

2. $\dfrac{\text{Equivalent coupon-issue yield} \times \text{amount of judgment}}{\text{365 (days)}} \times \text{(no. of days interest has run.)}$

Example, given a rate of 14.62%:

$$\frac{.1462 \times \$20{,}000.00}{365} \times 12 \text{ (days)} = \$96.13$$

If the interest is to be compounded on account of a delay in payment of one year or more, simply multiply the equivalent coupon-issue yield by the amount of the judgment and then add that interest amount to the amount of the original judgment. This gives you a new judgment amount to be inserted in the equation for the shorter time periods.

We will be most happy to try to answer any other questions this topic generates.

Sincerely,

/s/

CARL H. IMLAY
General Counsel

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA :
: SS.
COUNTY OF PHILADELPHIA :

I, Joseph A. Bonjorno, being duly sworn according to law, do depose and say as follows:

1. I was both President and a principal shareholder of Columbia Metal Culvert Company ("Columbia") from its formation to its dissolution and liquidation in 1980.

2. Columbia was plaintiff in the lawsuit against Kaiser Aluminum and Chemical Corporation and Kaiser Aluminum and Chemical Sales, Inc., (hereinafter collectively referred to as "Kaiser") docketed in the United States District Court for the Eastern District of Pennsylvania as Civil Action number 74-122 (the "Lawsuit"). On May 30, 1980, after the dissolution and liquidation of Columbia, I and the other principal shareholders of Columbia were substituted as plaintiffs in the Lawsuit.

3. In April, 1977, I, on behalf of Columbia, entered into an agreement with Philadelphia National Bank ("PNB") to refinance a loan originally extended by PNB to Columbia. Under this refinancing agreement, the balance of the loan amount of $193,760.28 was payable by Columbia to PNB at an interest rate equal to 2.5 percent above PNB's daily prime rate, or 3 percent above PNB's average monthly commercial paper rate, whichever rate was greater, compounded monthly.

4. Because of financial reverses suffered as a result of Kaiser's business practices, which ultimately destroyed our business, neither I nor the other principal shareholders of Columbia could raise the funds necessary to pay off PNB's loan to Columbia until Kaiser paid the damages attributable to its acts on July 3, 1986.

5. Although I and the other principal shareholders of Columbia repeatedly attempted, from 1977 to 1986, to reach a settlement with PNB on its loan to Columbia, PNB always insisted on repayment of all outstanding principal and interest.

6. Accordingly, on September 2 and September 18, 1986, I and the other principal shareholders of Columbia paid PNB the principal balance of $193,760.28 on its loan to Columbia. Additionally, we paid PNB $444,867.30 in interest that had accrued on this loan from December, 1978 to September, 1986.

7. Between August, 1979 and August, 1980, interest on the balance due PNB ranged from a low of 14 percent to a high of 22.5 percent, compounded monthly. From August, 1980 to August, 1981, interest ranged from a low of 15 percent to a high of 23 percent, compounded monthly. From August, 1981 to August, 1982, interest ranged from a low of 17 percent to a high of 22.5 percent. Between February, 1983 and March, 1984, interest on the balance due PNB was calculated at a rate of 13.5 percent, compounded monthly. From April, 1984 through May, 1985, rates ranged from a low of 13 percent to a high of 15.5 percent, again compounded monthly. From June, 1985 through August, 1986, rates ranged from a low of 10 percent to a high of 12.5 percent, compounded monthly.

8. Indeed, the rates of interest paid by Columbia and its shareholders to PNB in the period from August, 1979 through September, 1986 were, almost without exception, higher than the 10.05 percent rate of interest on the judgment which I and the other shareholders of Columbia seek against Kaiser. Moreover, the interest Columbia and its shareholders paid to PNB was compounded on a monthly basis.

/s/
Joseph A. Bonjorno

Sworn to and subscribed
for me this 20th day of
October, 1986.

/s/
Notary Public
LINDA S. PILLION
Notary Public, Phila., Phila. Co.
My Commission Expires Nov. 7, 1988

AFFIDAVIT OF CHARLES J. O'DONNELL

COMMONWEALTH OF PENNSYLVANIA :
SS
COUNTY OF PHILADELPHIA :

Charles J. O'Donnell submits this Affidavit in support of Plaintiffs' claim for interest on the judgment under 28 U.S.C. §1961 and being duly sworn according to law deposes and says:

1. I, Charles J. O'Donnell, am Controller of Duane, Morris & Heckscher.

2. My job duties include overseeing all accounting and financial activities at Duane, Morris & Heckscher.

3. I have a BS in accounting from Drexel University and I am a Certified Public Accountant in Pennsylvania.

4. I have made certain calculations of the interest accruing on certain principal amounts in connection with Plaintiffs' brief in support of their claim for interest on the judgment under 28 U.S.C. §1961. These calculations are set forth in the computer printouts attached to this Affidavit as Exhibits "A" and "B". These printouts accurately reflect the calculations made by me as described in this Affidavit.

5. As reflected in Exhibit "A", I computed the interest on the sum of $9,567,939.00 from August 16, 1979 through July 3, 1986, using the monthly average prime rate, as supplied by Fidelity Bank, and compounding the interest monthly. The interest on $9,567,939.00 from August 16, 1979 through July 3, 1986, using the monthly average prime rate, is $14,242,410.86. I then computed the interest on that sum, $14,242,410.86, from July 4, 1986 through October 22, 1986, using the monthly average prime rate as supplied by Fidelity Bank and compounded monthly. The total interest on $14,242,410.86 from July 4, 1986 through October 22, 1986, is $336,890.91. Thus, the total interest on $9,567,939.00 from August 16, 1979 through July 3, 1986, which is $14,242,410.86, plus the interest on

$14,242,410.86 from July 4, 1986, through October 22, 1986, which is $336,890.91, equals $14,579,301.77. This figure is the total interest amount reflected in Exhibit "A" using the monthly average prime rate and compounding the interest monthly.

6. As reflected in Exhibit "B", I also computed the interest on the principal $9,567,939.00 from August 16, 1979 through July 3, 1986, using the monthly average prime rate plus three points, which is the interest rate actually available to Plaintiffs during this period from PNB. The interest through July 3, 1986, is $19,631,680.13. The interest on $19,631,680.13 from July 4, 1986, through October 22, 1986, using the monthly average prime rate plus three points is $645,583.29. Thus, the sum of the interest on $9,567,939.00 from August 16, 1979 through July 3, 1986, and the interest on $19,631,680.13 from July 4, 1986, through October 22, 1986, is $19,631,680.13 plus $645,583.29, which equals $20,277,263.42.

7. I have reviewed Exhibit "A" and Exhibit "B" and they accurately reflect the calculations made by me as described in this Affidavit.

/s/
Charles J. O'Donnell

Sworn to and Subscribed
before me this 22nd day
of October, 1986.

/s/
Notary Public
Bernadette J. Scott
Notary Public, Phila., Phila. Co.
My Commission Expires July 16, 1988

Exhibit A

INTEREST AT PRIME RATE

Month	Prior Balance	Average Prime Rate	Interest Through END OF MONTH	Total
16-Aug-79	9,567,939.00	11.91%	49,952.51	9,617,891.51
01-Sep-79	9,617,891.51	12.90%	101,976.00	9,719,867.51
01-Oct-79	9,719,867.51	14.39%	118,792.76	9,838,660.27
01-Nov-79	9,838,660.27	15.55%	125,746.16	9,964,406.43
01-Dec-79	9,964,406.43	15.30%	129,482.68	10,093,889.11
01-Jan-80	10,093,889.11	15.25%	130,736.60	10,224,625.71
01-Feb-80	10,224,625.71	15.63%	126,973.04	10,351,598.75
01-Mar-80	10,351,598.75	18.31%	160,977.29	10,512,576.04
01-Apr-80	10,512,576.04	19.77%	170,822.16	10,683,398.20
01-May-80	10,683,398.20	16.57%	150,349.07	10,833,747.27
01-Jun-80	10,833,747.27	12.63%	112,463.20	10,946,210.47
01-Jul-80	10,946,210.47	11.48%	106,727.05	11,052,937.52
01-Aug-80	11,052,937.52	11.12%	104,388.18	11,157,325.70
01-Sep-80	11,157,325.70	12.23%	112,154.05	11,269,479.75
01-Oct-80	11,269,479.75	13.79%	131,988.76	11,401,468.51
01-Nov-80	11,401,468.51	16.06%	150,499.38	11,551,967.89
01-Dec-80	11,551,967.89	20.35%	199,659.15	11,751,627.04
01-Jan-81	11,751,627.04	20.16%	201,213.61	11,952,840.65
01-Feb-81	11,952,840.65	19.43%	178,159.55	12,131,000.20
01-Mar-81	12,131,000.20	18.05%	185,969.89	12,316,970.09
01-Apr-81	12,316,970.09	17.15%	173,618.66	12,490,588.75
01-May-81	12,490,588.75	19.61%	208,031.61	12,698,620.36
01-Jun-81	12,698,620.36	20.03%	209,057.56	12,907,677.92
01-Jul-81	12,907,677.92	20.39%	223,529.15	13,131,207.07
01-Aug-81	13,131,207.07	20.50%	228,626.91	13,359,833.98
01-Sep-81	13,359,833.98	20.08%	220,492.16	13,580,326.14
01-Oct-81	13,580,326.14	18.45%	212,801.85	13,793,127.99
01-Nov-81	13,793,127.99	16.84%	190,912.01	13,984,040.00
01-Dec-81	13,984,040.00	15.75%	187,060.48	14,171,100.48
01-Jan-82	14,171,100.48	15.75%	189,562.73	14,360,663.21
01-Feb-82	14,360,663.21	16.56%	182,431.57	14,543,094.78
01-Mar-82	14,543,094.78	16.50%	203,802.55	14,746,897.33
01-Apr-82	14,746,897.33	16.50%	199,992.17	14,946,889.50
01-May-82	14,946,889.50	16.50%	209,461.20	15,156,350.70
01-Jun-82	15,156,350.70	16.50%	205,545.03	15,361,895.73
01-Jul-82	15,361,895.73	16.26%	212,145.68	15,574,041.41
01-Aug-82	15,574,041.41	14.39%	190,340.39	15,764,381.80

Month	Prior Balance	Average Prime Rate	Interest Through END OF MONTH	Total
01-Sep-82	15,764,381.80	13.50%	174,919.85	15,939,301.65
01-Oct-82	15,939,301.65	12.52%	169,489.36	16,108,791.01
01-Nov-82	16,108,791.01	11.85%	156,895.21	16,265,686.22
01-Dec-82	16,265,686.22	11.50%	158,868.96	16,424,555.18
01-Jan-83	16,424,555.18	11.16%	155,677.78	16,580,232.96
01-Feb-83	16,580,232.96	10.98%	139,655.53	16,719,888.49
01-Mar-83	16,719,888.49	10.50%	149,104.76	16,868,993.25
01-Apr-83	16,868,993.25	10.50%	145,581.72	17,014,574.97
01-May-83	17,014,574.97	10.50%	151,732.72	17,166,307.69
01-Jun-83	17,166,307.69	10.50%	148,147.59	17,314,455.28
01-Jul-83	17,314,455.28	10.50%	154,406.99	17,468,862.27
01-Aug-83	17,468,862.27	10.89%	161,570.23	17,630,432.50
01-Sep-83	17,630,432.50	11.00%	159,398.43	17,789,830.93
01-Oct-83	17,789,830.93	11.00%	166,200.89	17,956,031.82
01-Nov-83	17,956,031.82	11.00%	162,342.21	18,118,374.03
01-Dec-83	18,118,374.03	11.00%	169,270.29	18,287,644.32
01-Jan-84	18,287,644.32	11.00%	170,851.69	18,458,496.01
01-Feb-84	18,458,496.01	11.00%	161,322.20	18,619,818.21
01-Mar-84	18,619,818.21	11.21%	177,275.97	18,797,094.18
01-Apr-84	18,797,094.18	11.93%	184,314.52	18,981,408.70
01-May-84	18,981,408.70	12.39%	199,741.62	19,181,150.32
01-Jun-84	19,181,150.32	12.60%	198,643.15	19,379,793.47
01-Jul-84	19,379,793.47	13.00%	213,974.16	19,593,767.63
01-Aug-84	19,593,767.63	13.00%	216,336.67	19,810,104.30
01-Sep-84	19,810,104.30	12.97%	211,181.14	20,021,285.44
01-Oct-84	20,021,285.44	12.58%	213,915.09	20,235,200.53
01-Nov-84	20,235,200.53	11.77%	195,754.78	20,430,955.31
01-Dec-84	20,430,955.31	11.06%	191,916.64	20,622,871.95
01-Jan-85	20,622,871.95	10.61%	185,837.50	20,808,709.45
01-Feb-85	20,808,709.45	10.50%	167,609.88	20,976,319.33
01-Mar-85	20,976,319.33	10.50%	187,062.79	21,163,382.12
01-Apr-85	21,163,382.12	10.50%	182,642.89	21,346,025.01
01-May-85	21,346,025.01	10.31%	186,915.15	21,532,940.16
01-Jun-85	21,532,940.16	9.78%	173,089.44	21,706,029.60
01-Jul-85	21,706,029.60	9.50%	175,134.95	21,881,164.55
01-Aug-85	21,881,164.55	9.50%	176,548.03	22,057,712.58
01-Sep-85	22,057,712.58	9.50%	172,231.45	22,229,944.03
01-Oct-85	22,229,944.03	9.50%	179,362.15	22,409,306.18
01-Nov-85	22,409,306.18	9.50%	174,976.77	22,584,282.95
01-Dec-85	22,584,282.95	9.50%	182,221.13	22,766,504.08
01-Jan-86	22,766,504.08	9.50%	183,691.38	22,950,195.46

Month	Prior Balance	Average Prime Rate	Interest Through END OF MONTH	Total
01-Feb-86	22,950,195.46	9.50%	167,253.48	23,117,448.94
01-Mar-86	23,117,448.94	9.10%	178,669.38	23,296,118.32
01-Apr-86	23,296,118.32	8.83%	169,072.38	23,465,190.70
01-May-86	23,465,190.70	8.50%	169,399.39	23,634,590.09
01-Jun-86	23,634,590.09	8.50%	165,118.37	23,799,708.46
01-Jul-86	23,799,708.46	8.16%	10,641.40	23,810,349.86
03-Jul-86	23,810,349.86			

23,810,349.86 - 9,567,939.00 = 14,242,410.86 Interest through 7/3/86

04-Jul-86	14,242,410.86	8.16%	89,153.59	14,331,564.45
01-Aug-86	14,331,564.45	7.90%	96,158.91	14,427,723.36
01-Sep-86	14,427,723.36	7.50%	88,938.02	14,516,661.38
01-Oct-86	14,516,661.38	7.50%	62,640.39	14,579,301.77
22-Oct-86	14,579,301.77	7.50%		

Breakdown of Interest	
Interest on Judgement from 8/16/79 to 7/3/86	$14,242,410,86
Interest on interest of $14,579,301.77 from 7/4/86 to 10/22/86 ($14,579,301.77-14,242,410.86)	336,890.91
TOTAL	$14,579,301.77

Exhibit B

INTEREST AT PLAINTIFFS' BORROWING RATE: PRIME +3

Date	Prior Balance	Average Prime Rate +3 Points	Interest Through END OF MONTH	Total
16-Aug-79	9,567,939.00	14.91%	62,535.00	9,630,474.00
01-Sep-79	9,630,474.00	15.90%	125,855.78	9,756,329.78
01-Oct-79	9,756,329.78	17.39%	144,096.98	9,900,426.76
01-Nov-79	9,900,426.76	18.55%	150,947.60	10,051,374.36
01-Dec-79	10,051,374.36	18.30%	156,223.14	10,207,597.50
01-Jan-80	10,207,597.50	18.25%	158,217.76	10,365,815.26
01-Feb-80	10,365,815.26	18.63%	153,433.95	10,519,249.21
01-Mar-80	10,519,249.21	21.31%	190,386.88	10,709,636.09
01-Apr-80	10,709,636.09	22.77%	200,431.57	10,910,067.66
01-May-80	10,910,067.66	19.57%	181,337.28	11,091,404.94
01-Jun-80	11,091,404.94	15.63%	142,486.57	11,233,891.51
01-Jul-80	11,233,891.51	14.48%	138,155.32	11,372,046.83
01-Aug-80	11,372,046.83	14.12%	136,377.32	11,508,424.15
01-Sep-80	11,508,424.15	15.23%	144,060.25	11,652,484.40
01-Oct-80	11,652,484.40	16.79%	166,164.43	11,818,648.83
01-Nov-80	11,818,648.83	19.06%	185,148.04	12,003,796.87
01-Dec-80	12,003,796.87	23.35%	238,053.38	12,241,850.25
01-Jan-81	12,241,850.25	23.16%	240,798.87	12,482,649.12
01-Feb-81	12,482,649.12	22.43%	214,783.64	12,697,432.76
01-Mar-81	12,697,432.76	21.05%	227,005.75	12,924,438.51
01-Apr-81	12,924,438.51	20.15%	214,049.95	13,138,488.46
01-May-81	13,138,488.46	22.61%	252,298.57	13,390,787.03
01-Jun-81	13,390,787.03	23.03%	253,471.09	13,644,258.12
01-Jul-81	13,644,258.12	23.39%	271,049.73	13,915,307.85
01-Aug-81	13,915,307.85	23.50%	277,734.30	14,193,042.15
01-Sep-81	14,193,042.15	23.08%	269,240.07	14,462,282.22
01-Oct-81	14,462,282.22	21.45%	263,471.08	14,725,753.30
01-Nov-81	14,725,753.30	19.84%	240,130.64	14,965,883.94
01-Dec-81	14,965,883.94	18.75%	238,326.58	15,204,210.52
01-Jan-82	15,204,210.52	18.75%	242,121.85	15,446,332.37
01-Feb-82	15,446,332.37	19.56%	231,771.16	15,678,103.53
01-Mar-82	15,678,103.53	19.50%	259,655.17	15,937,758.70
01-Apr-82	15,937,758.70	19.50%	255,440.79	16,193,199.49
01-May-82	16,193,199.49	19.50%	268,186.00	16,461,385.49
01-Jun-82	16,461,385.49	19.50%	263,833.16	16,725,218.65
01-Jul-82	16,725,218.65	19.26%	273,587.92	16,998,806.57

Date	Prior Balance	Average Prime Rate +3 Points	Interest Through END OF MONTH	Total
01-Aug-82	16,998.806.57	17.39%	251,065.39	17,249,871.96
01-Sep-82	17,249,871.96	16.50%	233,936.62	17,483,808.58
01-Oct-82	17,483,808.58	15.52%	230,460.55	17,714,269.13
01-Nov-82	17,714,269.13	14.85%	216,211.15	17,930,480.28
01-Dec-82	17,930,480.28	14.50%	220,815.09	18,151,295.37
01-Jan-83	18,151,295.37	14.16%	218,292.95	18,369,588.32
01-Feb-83	18,369,588.32	13.98%	197,002.51	18,566,590.83
01-Mar-83	18,566,590.83	13.50%	212,879.95	18,779,470.78
01-Apr-83	18,779,470.78	13.50%	208,374.95	18,987,845.73
01-May-83	18,987,845.73	13.50%	217,709.96	19,205,555.69
01-Jun-83	19,205,555.69	13.50%	213,102.74	19,418,658.43
01-Jul-83	19,418,658.43	13.50%	222,649.55	19,641,307.98
01-Aug-83	19,641,307.98	13.89%	231,708.24	19,873,016.22
01-Sep-83	19,873,016.22	14.00%	228,675.80	20,101,692.02
01-Oct-83	20,101,692.02	14.00%	239,017.38	20,340,709.40
01-Nov-83	20,340,709.40	14.00%	234,057.48	20,574,766.88
01-Dec-83	20,574,766.88	14.00%	244,642.43	20,819,409.31
01-Jan-84	20,819,409.31	14.00%	247,551.33	21,066,960.64
01-Feb-84	21,066,960.64	14.00%	234,333.86	21,301,294.50
01-Mar-84	21,301,294.50	14.21%	257,080.36	21,558,374.86
01-Apr-84	21,558,374.86	14.93%	264,547.84	21,822,922.70
01-May-84	21,822,922.70	15.39%	285,246.53	22,108,169.23
01-Jun-84	22,108,169.23	15.60%	283,469.13	22,391,638.36
01-Jul-84	22,391,638.36	16.00%	304,280.89	22,695,919.25
01-Aug-84	22,695,919.25	16.00%	308,415.78	23,004,335.03
01-Sep-84	23,004,335.03	15.97%	301,955.53	23,306,290.56
01-Oct-84	23,306,290.56	15.58%	308,396.50	23,614,687.06
01-Nov-84	23,614,687.06	14.77%	286,675.83	23,901,362.89
01-Dec-84	23,901,362.89	14.06%	285,415.01	24,186,777.90
01-Jan-85	24,186,777.90	13.61%	279,579.27	24,466,357.17
01-Feb-85	24,466,357.17	13.50%	253,377.62	24,719,734.79
01-Mar-85	24,719,734.79	13.50%	283,430.38	25,003,165.17
01-Apr-85	25,003,165.17	13.50%	277,432.38	25,280,597.55
01-May-85	25,280,597.55	13.31%	285,781.57	25,566,379.12
01-Jun-85	25,566,379.12	12.78%	268,552.05	25,834,931.17
01-Jul-85	25,834,931.17	12.50%	274,274.95	26,109,206.12
01-Aug-85	26,109,206.12	12.50%	277,186.78	26,386,392.90
01-Sep-85	26,386,392.90	12.50%	271,093.08	26,657,485.98
01-Oct-85	26,657,485.98	12.50%	283,007.56	26,940,493.54
01-Nov-85	26,940,493.54	12.50%	276,785.89	27,217,279.43
01-Dec-85	27,217,279.43	12.50%	288,950.57	27,506,230.00

Date	Prior Balance	Average Prime Rate +3 Points	Interest Through END OF MONTH	Total
01-Jan-86	27,506,230.00	12.50%	292,018.20	27,798,248.20
01-Feb-86	27,798,248.20	12.50%	266,558.54	28,064,806.74
01-Mar-86	28,064,806.74	12.10%	288,413.95	28,353,220.69
01-Apr-86	28,353,220.69	11.83%	275,686.52	28,628,907.21
01-May-86	28,628,907.21	11.50%	279,622.07	28,908,529.28
01-Jun-86	28,908,529.28	11.50%	273,245.00	29,181,774.28
01-Jul-86	29,181,774.28	11.16%	17,844.85	29,199,619.13
03-Jul-86	29,199,619.13			

29,199,619.13 - 9,567,939.00 = 19,631,680.13 Interest through 7/3/86

04-Jul-86	19,631,680.13	11.16%	168,068.70	19,799,748.83
01-Aug-86	19,799,748.83	10.90%	183,296.85	19,983,045.68
01-Sep-86	19,983,045.68	10.50%	172,456.42	20,155,502.10
01-Oct-86	20,155,502.10	10.50%	121,761.32	20,277,263.42
22-Oct-86	20,277,263.42	10.50%		

Breakdown of Interest

Interest on Judgement from 8/16/79 to 7/3/86	$19,631,680.13
Interest on interest of $19,631,680.13 from 7/4/86 to 10/22/86 ($20,277,263.42 - 19,631,680.13)	645,583.29
TOTAL	$20,277,263.42

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR and BARBARA K. CLISBY,	:	CIVIL ACTION
vs.	:	NO. 74-122
KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	

NOTICE OF APPEAL

Plaintiffs appeal to the United States Court of Appeals for the Third Circuit from the Order of the District Court dated April 11, 1988 awarding plaintiffs post-judgment interest in the amount of $2,632,886.30.

DUANE, MORRIS & HECKSCHER

By: /s/
Henry T. Reath
Michael M. Baylson
Edward G. Biester
Attorneys for Plaintiffs.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR., and BARBARA K. CLISBY, As Trustees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc., Plaintiffs	:	CIVIL ACTION
vs.	:	NO. 74-122
KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC., Defendants	:	

NOTICE OF CROSS-APPEAL

Defendants, Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc. hereby cross-appeal to the United States Court of Appeals for the Third Circuit from the Order of the District Court dated April 11, 1988, awarding post-judgment interest to plaintiffs in the amount of $2,632,886.30.

/s/
RICHARD P. McELROY
ANN B. LAUPHEIMER

BLANK, ROME, COMISKY
& McCAULEY
1200 Four Penn Center Plaza
Philadelphia, PA 19103
(215) 569-5500

OF COUNSEL:

Stephen B. Ringwood, Esq.

Kaiser Aluminum & Chemical Corp.
300 Lakeside Drive
Oakland, CA 94643
(415) 271-3209

DATED: May 11, 1988

COMMONWEALTH OF PENNSYLVANIA :
:
COUNTY OF PHILADELPHIA :

AFFIDAVIT OF CHARLES J. O'DONNELL

Charles J. O'Donnell submits this Affidavit in support of Plaintiffs' appeal in *Joseph A. Bonjorno, et al. v. Kaiser Aluminum & Chemical Corporation, et al.*, No. 88-1318 (3d Cir.), and being duly sworn according to law deposes and says:

1. I, Charles J. O'Donnell, am controller of Duane, Morris & Heckscher.

2. My job duties include overseeing all accounting and financial activities at Duane, Morris & Heckscher.

3. I have a B.S. Degree in Accounting from Drexel University and I am a certified public accountant in Pennsylvania.

4. I have made certain calculations of the interest on certain principal amounts in connection with Plaintiffs' Brief on appeal in support of their claim for interest on the judgment. My calculation are set forth in the computer printouts attached to this Affidavit as Exhibits A and B. These printouts accurately reflect the calculations made by me as described in this Affidavit.

5. As reflected in Exhibit A, I computed interest on the principal amount of $9,567,939 from August 16, 1979 through June 13, 1988, using the monthly average prime rate supplied by Fidelity Bank, compounded monthly, accounting for payment of $9,567,939 against the principal on July 3, 1986. Under these assumptions, the total amount due as of June 13, 1988 would be $17,080,036.78. Interest continues to run at a rate of $4,250 per day.

6. As reflected in Exhibit B, I computed interest on the principal amount of $9,567,939 from August 16, 1979 through June 13, 1988, using the federal T-Bill rate, as of

August 15, 1979, of \$10.05%, compounded *annually*, accounting for a payment against principal in the amount of \$9,567,939 on July 3, 1986. Under these assumptions, the total amount due as of June 13, 1988 would be \$10,823,335.65. Interest continues to run at a rate of \$2,851.37 per day.

7. I have reviewed Exhibits A and B to this Affidavit and they accurately reflect the calculations made by me as described in this Affidavit.

/s/ CHARLES J. O'DONNELL
Charles J. O'Donnell

Sworn to and Subscribed
before me this 13th day
of June, 1988.

/s/ KAREN A. GILLIAM
Notary Public
KAREN A. GILLIAM
Notary Public, Phila., Phila. Co.
My Commission Expires June 3, 1991

Exhibit A

INTEREST AT PRIME RATE

Month	Prior Balance	Average Prime Rate	Interest Through END OF MONTH	Total
Principal				9,567,939.00
16-Aug-79	9,567,939.00	11.91%	50,529.57	9,618,468.57
01-Sep-79	9,618,468.57	12.90%	103,398.54	9,721,867.11
01-Oct-79	9,721,867.11	14.39%	120,491.42	9,842,358.53
01-Nov-79	9,842,358.53	15.55%	127,540.56	9,969,899.09
01-Dec-79	9,969,899.09	15.30%	131,381.22	10,101,280.31
01-Jan-80	10,101,280.31	15.25%	132,677.43	10,233,957.74
01-Feb-80	10,233,957.74	15.63%	128,826.21	10,362,783.95
01-Mar-80	10,362,783.95	18.31%	163,430.79	10,526,214.74
01-Apr-80	10,526,214.74	19.77%	173,419.39	10,699,634.13
01-May-80	10,699,634.13	16.57%	152,703.90	10,852,338.03
01-Jun-80	10,852,338.03	12.63%	114,220.86	10,966,558.89
01-jul-80	10,966,558.89	11.48%	108,427.76	11,074,986.65
01-Aug-80	11,074,986.65	11.12%	106,065.48	11,181,052.13
01-Sep-80	11,181,052.13	12.23%	113,953.56	11,295,005.69
01-Oct-80	11,295,005.69	13.79%	134,150.65	11,429,156.34
01-Nov-80	11,429,156.34	16.06%	152,960.21	11,582,116.55
01-Dec-80	11,582,116.55	20.35%	203,017.56	11,785,134.11
01-Jan-81	11,785,134.11	20.16%	204,646.91	11,989,781.02
01-Feb-81	11,989,781.02	19.43%	181,095.00	12,170,876.02
01-Mar-81	12,170,876.02	18.05%	189,219.80	12,360,095.82
01-Apr-81	12,360,095.82	17.15%	176,646.37	12,536,742.19
01-May-81	12,536,742.19	19.61%	211,757.66	12,748,499.85
01-Jun-81	12,748,499.85	20.03%	212,793.71	12,961,293.56
01-Jul-81	12,961,293.56	20.39%	227,639.21	13,188,932.77
01-Aug-81	13,188,932.77	20.50%	232,887.23	13,421,820.00
01-Sep-81	13,421,820.00	20.08%	224,591.79	13,646,411.79
01-Oct-81	13,646,411.79	18.45%	216,862.65	13,863,274.44
01-Nov-81	13,863,274.44	16.84%	194,547.95	14,057,822.39
01-Dec-81	14,057,822.39	15.75%	190,700.75	14,248,523.14
01-Jan-82	14,248,523.14	15.75%	193,287.69	14,441,810.83
01-Feb-82	14,441,810.83	16.56%	185,925.38	14,627,736.21
01-Mar-82	14,627,736.21	16.50%	207,883.17	14,835,619.38
01-Apr-82	14,835,619.38	16.50%	203,989.77	15,039,609.15
01-May-82	15,039,609.15	16.50%	213,736.53	15,253,345.68
01-Jun-82	15,253,345.68	16.50%	209,733.50	15,463,079.18
01-Jul-82	15,463,079.18	16.26%	216,557.56	15,679,636.74

Month	Prior Balance	Average Prime Rate	Interest Through END OF MONTH	Total
01-Aug-82	15,679,636.74	14.39%	194,331.16	15,873,967.90
01-Sep-82	15,873,967.90	13.50%	178,582.14	16,052,550.04
01-Oct-82	16,052,550.04	12.52%	173,094.32	16,225,644.36
01-Nov-82	16,225,644.36	11.85%	160,228.24	16,385,872.60
01-Dec-82	16,385,872.60	11.50%	162,291.49	16,548,164.09
01-Jan-83	16,548,164.09	11.16%	159,052.43	16,707,216.52
01-Feb-83	16,707,216.52	10.98%	142,636.25	16,849,852.77
01-Mar-83	16,849,852.77	10.50%	152,372.91	17,002,225.68
01-Apr-83	17,002,225.68	10.50%	148,769.47	17,150,995.15
01-May-83	17,150,995.15	10.50%	155,096.13	17,306,091.28
01-Jun-83	17,306,091.28	10.50%	151,428.30	17,457,519.58
01-Jul-83	17,457,519.58	10.50%	157,868.03	17,615,387.61
01-Aug-83	17,615,387.61	10.89%	165,213.21	17,780,600.82
01-Sep-83	17,780,600.82	11.00%	162,988.84	17,943,589.66
01-Oct-83	17,943,589.66	11.00%	169,991.56	18,113,581.22
01-Nov-83	18,113,581.22	11.00%	166,041.16	18,279,622.38
01-Dec-83	18,279,622.38	11.00%	173,175.02	18,452,797.40
01-Jan-84	18,452,797.40	11.00%	174,815.62	18,627,613.02
01-Feb-84	18,627,613.02	11.00%	165,036.21	18,792,649.23
01-Mar-84	18,792,649.23	11.21%	181,434.65	18,974,083.88
01-Apr-84	18,974,083.88	11.93%	188,634.02	19,162,717.90
01-May-84	19,162,717.90	12.39%	204,485.30	19,367,203.20
01-Jun-84	19,367,203.20	12.60%	203,355.63	19,570,558.83
01-Jul-84	19,570,558.83	13.00%	219,120.95	19,789,679.78
01-Aug-84	19,789,679.78	13.00%	221,574,33	20,011,254.11
01-Sep-84	20,011,254.11	12.97%	216,288.30	20,227,542.41
01-Oct-84	20,227,542.41	12.58%	219,158.63	20,446,701.04
01-Nov-84	20,446,701.04	11.77%	200,548.06	20,647,249.10
01-Dec-84	20,647,249.10	11.06%	196,672.22	20,843,921.32
01-Jan-85	20,843,921.32	10.61%	190,466.15	21,034,387.47
01-Feb-85	21,034,387.47	10.50%	171,730.88	21,206,118.35
01-Mar-85	21,206,118.35	10.50%	191,766.54	21,397,884.89
01-Apr-85	21,397,884.89	10.50%	187,231.49	21,585,116.38
01-May-85	21,585,116.38	10.31%	191,661.23	21,776,777.61
01-Jun-85	21,776,777.61	9.78%	177,480.74	21,954,258.35
01-Jul-85	21,954,258.35	9.50%	179,621.67	22,133,880.02
01-Aug-85	22,133,880.02	9.50%	181,091.27	22,314,971.29
01-Sep-85	22,314,971.29	9.50%	176,660.19	22,491,631.48
01-Oct-85	22,491,631.48	9.50%	184,018.26	22,675,649.74
01-Nov-85	22,675,649.74	9.50%	179,515.56	22,855,165.30
01-Dec-85	22,855,165.30	9.50%	186,992.56	23,042,157.86

Month	Prior Balance	Average Prime Rate	Interest Through END OF MONTH	Total
01-Jan-86	23,042,157.86	9.50%	188,522.46	23,230,680.32
01-Feb-86	23,230,680.32	9.50%	171,603.75	23,402,284.07
01-Mar-86	23,402,284.07	9.10%	183,406.02	23,585,690.09
01-Apr-86	23,585,690.09	8.83%	173,551.37	23,759,241.46
01-May-86	23,759,241.46	8.50%	173,924.93	23,933,166.39
01-Jun-86	23,933,166.39	8.50%	169,526.60	24,102,692.99
01-Jul-86	24,102,692.99	8.16%	10,892.03	24,113,585.02
03-Jul-86	24,113,585.02			
24,113,585.02 - 9,567,939.00 = 14,545,646.02 Interst through 7/3/86				
04-Jul-86	14,545,646.02	8.16%	92,295.49	14,637,941.51
01-Aug-86	14,637,941.51	7.90%	99,589.57	14,737,531.08
01-Sep-86	14,737,531.08	7.50%	92,109.57	14,829,640.65
01-Oct-86	14,829,640.65	7.50%	95,784.72	14,925,425.37
01-Nov-86	14,925,425.37	7.50%	93,283.91	15,018,709.28
01-Dec-86	15,018,709.28	7.50%	97,005.91	15,115,715.19
01-Jan-87	15,115,715.19	7.50%	97,632.48	15,213,347.67
01-Feb-87	15,213,347.67	7.50%	88,726.08	15,302,073.75
01-Mar-87	15,302,073.75	7.50%	98,836.17	15,400,909.92
01-Apr-87	15,400,909.92	7.73%	99,207.53	15,500,117.45
01-May-87	15,500,117.45	8.14%	108,659.47	15,608,776.92
01-Jun-87	15,608,776.92	8.25%	107,310.34	15,716,087.26
01-Jul-87	15,716,087.26	8.25%	111,662.47	15,827,749.73
01-Aug-87	15,827,749.73	8.25%	112,455.83	15,940,205.56
01-Sep-87	15,940,205.56	8.70%	115,566.49	16,055,772.05
01-Oct-87	16,055,772.05	9.07%	125,415.80	16,181,187.85
01-Nov-87	16,181,187.85	8.78%	118,392.36	16,299,580.21
01-Dec-87	16,299,580.21	8.75%	122,827.70	16,422,407.91
01-Jan-88	16,422,407.91	8.75%	123,753.28	16,546,161.19
01-Feb-88	16,546,161.19	8.51%	113,415.16	16,659,576.35
01-Mar-88	16,659,576.35	8.50%	121,953.21	16,781,529.56
01-Apr-88	16,781,529.56	8.50%	118,869.17	16,900,398.73
01-May-88	16,900,398.73	8.84%	128,665.35	17,029,064.08
01-Jun-88	17,029,064.08	9.00%	50,972.70	17,080,036.78
13-Jun-88	17,080,036.78			

Breakdown of Interest

Interest on Judgement from 8/16/79 to 7/3/86	$14,545,646.02
Interest on compound interest of $14,545,646.02 from 7/4/86 to 6/13/88 ($17,080,036.78 - 14,545,646.02)	2,534,390.76
TOTAL	$17,080,036.78

Exhibit B

INTEREST AT FEDERAL T-BILL RATE (8/15/79)

Period	Prior Balance	Rate	Interest Through End of Year (Period)	Total
Principal				9,567,939.00
16-Aug-79	9,567,939.00	10.05%	363,555.47	9,931,494.47
01-Jan-80	9,931,494.47	10.05%	998,115.19	10,929,609.66
01-Jan-81	10,929,609.66	10.05%	1,098,425.77	12,028,035.43
01-Jan-82	12,028,035.43	10.05%	1,208,817.56	13,236,852.99
01-Jan-83	13,236,852.99	10.05%	1,330,303.73	14,567,156.72
01-Jan-84	14,567,156.72	10.05%	1,463,999.25	16,031,155.97
01-Jan-85	16,031,155.97	10.05%	1,611,131.17	17,642,287.14
01-Jan-86	17,642,287.14	10.05%	888,953.76	18,531,240.90
03-Jul-86	18,531,240.90			

18,531,240.90 - 9,567,939.00 = 8,963,301.90 Interest through 7/3/86

04-Jul-86	8,963,301.90	10.05%	446,703.95	9,410,005.85
01-Jan-87	9,410,005.85	10.05%	945,705.59	10,355,711.44
01-Jan-88	10,355,711.44	10.05%	467,624.21	10,823,335.65
13-Jun-88	10,823,335.65			

Breakdown of Interest	
Interest on Judgment from 8/16/79 to 7/3/86	$ 8,963,301.90
Interest on compound interest of $8,963,301.90 from 7/4/86 to 6/13/88 ($10,823,335.65 - 8,963,301.90)	1,860,033.75
TOTAL	$10,823,335.65

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-1318 & 88-1396

BONJORNO, JOSEPH A., KERR, GEORGE M., and CLISBY, BARBARA K., as Transferees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.,
Appellants No. 88-1318

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.

BONJORNO, JOSEPH A., KERR, GEORGE M., and CLISBY, BARBARA K., as Transferees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,
Appellants No. 88-1396

SUR PETITION FOR REHEARING

Before: GIBBONS, *Chief Judge,* SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN AND NYGAARD, *Circuit Judges*

The petitions for rehearing filed by appellants in No. 88-1318 and appellants in No. 88-1396 having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petitions for rehearing are denied.

Judge Stapleton would have granted rehearing in banc for the reason set forth in his dissent. Judge Becker and Judge Hutchinson would also have granted rehearing in banc.

By the Court,

/s/
Circuit Judge

Dated: February 13, 1989

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 19, 1989

Mr. Richard P. McElroy
Blank, Rome, Comisky, McCauley
1200 Four Penn Center Plaza
Philadelphia, PA 19103

Re: Kaiser Aluminum & Chemical Corporation, et al.,
v. Joseph A. Bonjorno, et al.
No. 88-1595
Joseph A. Bonjorno, et al.,
v. Kaiser Aluminum & Chemical Corporation, et al.
No. 88-1771

Dear Mr. McElroy:

The Court today entered the following order in each of the above entitled cases:

The petition for a writ of certiorari is granted.

Very truly yours,

/s/
Joseph F. Spaniol, Jr., Clerk